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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 283.

JOHN B. WIGHT, JOHN W. ROSS, AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

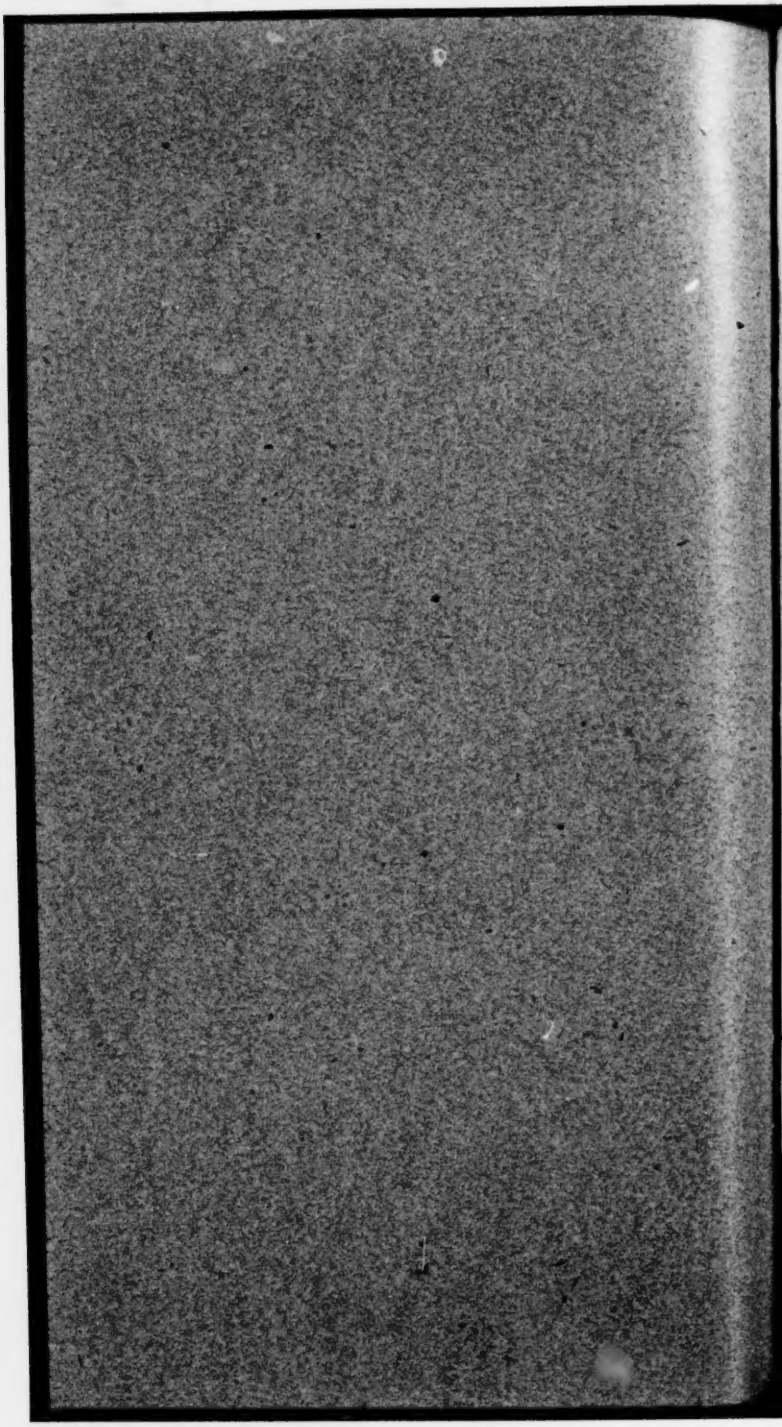
vs.

CHARLES H. DAVIDSON AND A. A. WILSON AND JOHN B. LARNER, TRUSTEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 15, 1900.

(17,765.)



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1 In the Court of Appeals of the District of Columbia.

CHARLES H. DAVIDSON ET AL., Trustees, Appellants,
vs.
JOHN B. WIGHT ET AL., Comm'rs D. C. } No. 958.

Supreme Court of the District of Columbia.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.
No. 549. District Court.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition of John B. Wight, John W. Ross, and Lansing H. Beach for Condemnation Proceedings.

Filed Mar. 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress, by act approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes," directed your petitioners to institute by a petition in this court a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one (4-) and forty-two (42) of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia: Provided that the owners of the "Kall" tract dedicate the land in said tract contained within the lines of said streets.

2. That the owners of the aforesaid "Kall" tract have
2 dedicated to the District of Columbia for highway purposes the land in said tract contained within the lines of S, Twenty-second, and Decatur streets.

3. That a map of the proposed extension of S, Twenty-second, and Decatur streets, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, has been prepared, and a copy thereof

is hereto annexed as part of this petition, marked "Exhibit D. C. No. 1."

4. That said act of Congress further provides that of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as therein provided for.

Wherefore your petitioners pray this honorable court to direct the marshal of the District of Columbia to summon a jury of seven judicious disinterested men, not related to any party interested, to be and appear on the premises, on a day specified, to assess the damages, if any, which each owner of land through which S, Twenty-second, and Decatur streets are proposed to be extended, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over said lands may be obtained and secured for the extension of S, Twenty-second, and Decatur streets aforesaid; and they will ever pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

(Here follows map marked "Exhibit D. C. No. 1," p. 4.)

3 *Order of Publication.*

Filed Apr. 3, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS NORTHWEST. No. 549.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes," have filed a petition in this court praying the condemnation of the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one (41) and forty-two (42) of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, a part of Widow's Mite, as shown on a plat or map prepared by said Commissioners and annexed to their

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said petition and marked "Exhibit D. C. No. 2," and praying also that a jury be summoned by the marshal, in accordance with chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to ascertain and assess the damages, if any, which each owner of land through which S, Twenty-second, and Decatur streets are proposed to be extended may sustain by reason thereof, and to assess not less than one-half of the amount found due and awarded as damages by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as they are proposed.

It is ordered, this 3rd day of April, 1899, that all persons interested in the proceedings be, and they are hereby, required to appear in this court on or before the — day of April, 1899, and show cause, if any they have, why the prayer of said petition should not be taken: Provided a copy of this order be published in the Washington Post and the Washington Times newspaper- at least six times and in the Washington Law Reporter once before said 22nd day of April, 1899.

By the court:

W. S. COX, *J.*

Memoranda.

April 14, 1899.—Proof of publication in Washington Law Reporter filed.

May 12, 1899.—Proof of publication in Washington Times filed.

4 *Order to Summon Jury.*

Filed Jul- 21, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF "S," TWENTY-SECOND, AND DECATUR STREETS. No. 549.

Notice by advertisement ordered herein having been duly published, now, on consideration of the petition of the Commissioners of the District of Columbia filed herein, it is this 21st day of July, 1899, on motion of counsel for said Commissioners, *ordered* that the United States marshal for the District of Columbia summon a jury of seven judicious, disinterested men not related to any party interested in this proceeding, to be and appear upon the premises described in the petition herein, on a day specified, to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend "S," Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as prayed in said petition, and of the amount found due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less

than one-half thereof shall be assessed by said jury against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, and to further proceed in accordance with the act of Congress approved March 3, 1899, entitled "An act to extend 'S' street in the District of Columbia, and for other purposes."

By the court:

A. C. BRADLEY.

Verdict.

Filed Aug. 30, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF S, 22ND, AND DECATUR STREETS. No. 549.

United States marshal's office.

WASHINGTON, D. C., *August* 30, 1899.

To the honorable the justice of said court:

As directed by the order of the court passed in the above-entitled cause, I summoned the following jury of seven judicious, disinterested men, not related to any party interested in this proceeding: William S. Knox, Frank K. Raymond, James P. Willett, James F. Oyster, Harry B. Parker, Clement W. Howard, Charles Worthington, to be and appear on the premises described in the petition herein on Thursday, August 24, A. D. 1899, at 11 o'clock a. m., meeting at the corner of 21st street and Florida avenue, and from thence to proceed to view the premises to be condemned for said purpose, and to assess the damages for the land condemned, and to assess not less than one-half of those damages against those parcels of land lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, as provided by the act of Congress approved March 3, 1899.

The said jury met on said premises on the day and date aforesaid, and took and subscribed the oath herewith returned, and, after viewing the premises, adjourned to meet at the city hall on Friday, August 25, 1899, at 11 o'clock a. m., to take testimony and hear evidence in the case. The said jury met and took testimony and heard evidence on August 25, 1899, and on August 28 said jury also met and heard evidence and arguments of counsel, viz., A. B. Duvall, Esq., on behalf of the Commissioners of the District of Columbia, and J. J. Darlington, Esq., on behalf of Mr. Leroy Tuttle, and W. Riley Deeble, representing the Kall tract. On August 29 and 30 said jury also met and made up their verdict and award, which is hereto attached; and, in pursuance to the statutes, section 252, R. S. D. C., I herewith transmit the same to the court.

The following-named witnesses were examined on behalf of the petitioners: William P. Richards, John C. Davidson, W. Riley Deeble.

And the following-named witnesses were examined on behalf of the property-owners: Leroy Tuttle, Clarke K. Tilton, Henry Simpson, Z. M. Knott, and William W. Souder.

Mr. Leroy Tuttle, the owner of the property to be condemned, was on August 11, 1899, personally served with the following notice of the time and place of the meeting of the jury and was present with his counsel, J. J. Darlington, Esq., when the jury was sworn:

"UNITED STATES MARSHAL'S OFFICE,
WASHINGTON, D. C., *Aug.* 10, 1899.

Mr. Leroy Tuttle:

This is to notify you that, pursuant to the order of the supreme court of the District of Columbia, holding a district court, in case No. 549, in the matter of the condemnation of land necessary to open and extend 'S,' Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, a part of Widow's Mite, as set forth in the petition filed in the said case, a jury of seven judicious, disinterested men, not related to any party interested in any of the property in any way affected by said proceeding, have been summoned by me to meet on Thursday, the 24th day of August, 1899,
6 at eleven o'clock a. m., at the corner of Twenty-first street and Florida avenue, to proceed to view the premises to be condemned, and to assess the damages for the land condemned, and to assess not less than one-half of those damages against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, as provided by act of Congress approved March 3, 1899.

Very respectfully, AULICK PALMER, *Marshal.*"

The oath taken and subscribed by the jury and their verdict, assessment, and award are hereto appended.

Very respectfully, AULICK PALMER, *Marshal,*
By W. B. ROBINSON,
Chief Deputy Marshal.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

We, the undersigned, the jury summoned and empaneled by the marshal of the District of Columbia to ascertain and award the damages which each owner of land may sustain by reason of the condemnation of land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, a part of Widow's Mite, and to assess not less than one-half of those damages against the pieces and parcels of ground situate and lying on each side of the extension of said street, and also on all or any adjacent premises or parcels of land which will be benefited by the opening of said street, as provided by act of Congress approved March 3, 1899, do solemnly swear on our several oaths that we are disinter-

ested, not related to any party interested in any of the property in any way affected by this proceeding, and that, without favor or partiality to any one, to the best of our judgment we will decide what damages each owner may sustain by reason of the extension of S, Twenty-second, and Decatur streets, as aforesaid, and that we will assess not less than one-half the aggregate amount of said damages as provided by law.

CLEMENT W. HOWARD. [SEAL.]
JAMES P. WILLETT. [SEAL.]
JAS. F. OYSTER. [SEAL.]
W. S. KNOX. [SEAL.]
FRANK K. RAYMOND. [SEAL.]
HARRY B. PARKER. [SEAL.]
CHARLES WORTHINGTON. [SEAL.]

Subscribed and sworn to before me this 24th day of August, 1899.

AULICK PALMER,
U. S. Marshal,
By W. B. ROBINSON,
Deputy Marshal.

7 In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.
No. 549.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken, necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on the plat or map filed with the petition in this cause, as set forth in Schedule 1, hereto annexed as part hereof:

And we, the jury aforesaid, in accordance with the act of Congress approved March 3, 1899, for the extension of said streets, do hereby assess the sum of $26,000, being not less than one-half of the damages so, as aforesaid, awarded in Schedule 1 against the pieces and parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which we find will be benefited by the extension of said streets, as set forth in Schedule 2, hereto annexed as part hereof.

As witness our hands and seals this 30th day of August, A. D. 1899.

WM. S. KNOX. [SEAL.]
FRANK K. RAYMOND. [SEAL.]
JAMES P. WILLETT. [SEAL.]
JAS. F. OYSTER. [SEAL.]
HARRY B. PARKER. [SEAL.]
CLEMENT W. HOWARD. [SEAL.]
CHARLES WORTHINGTON. [SEAL.]

SCHEDULE # 1.

Award of Damages for the Extension of S, 22nd, and Decatur Streets.

Description of piece or parcel of land taken.	Area taken.	Award of damages.
Parts of lots 41 and 42 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of S and 22nd streets extended, as shown on map accompanying petition in this cause	20,868.9 sq. ft.	$36,000.00
Part of lot 41 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of Decatur place extended, as shown on the map annexed to petition in this cause	12,560.4 "	16,000.00

8 SCHEDULE # 2.

Assessment of Benefits for the Extension of S, 22nd, and Decatur Streets.

Description of piece or parcel of land benefited.	Name of owner.	Benefits.
Lot 1, block 13, Kalorama Heights subdivision.	Charlotte B. Lovett	$125.
Lot 2, block 13, Kalorama Heights subdivision.	A. J. Drexel	100.
Lot 3, block 13, Kalorama Heights subdivision.	Wm. W. Kurtz	100.
Lot 4, block 13, Kalorama Heights subdivision.	Randolph Ellis	100.
Lot 5, block 13, Kalorama Heights subdivision.	Stephen A. Caldwell	100.
Lot 25, block 12, Kalorama Heights subdivision	Inez R. Crawford	100.
Lot 26, block 12, Kalorama Heights subdivision	John C. Bullitt	100.
Lot 27, block 12, Kalorama Heights subdivision	John L. Welsh	100.
Lot 28, block 12, Kalorama Heights subdivision	E. J. Stellwagen	100.
Lot 29, block 12, Kalorama Heights subdivision	Thos. M. Gale	100.
Lot 30, block 12, Kalorama Heights subdivision	Stephen A. Caldwell	125.
Lot 31, block 12, Kalorama Heights subdivision	A. J. Drexel	50.
Part of the Kall tract described as follows: Beginning at the intersection of the north line of S street with the east boundary of Kalorama Hts. subdivision, thence east 451.62 feet, thence north 21.14 west 107.2 feet, thence west 461.2 feet, thence south 25.50 east to the place of beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	6,000.00
Part of the Kall tract as follows: Beginning at the southwest corner of S and 22nd street-, west 388.67 —, thence south 25.50 east 88.35 feet, thence south 24 47 east 266.19 feet, thence east 104.73 feet, thence north 195 feet to place of beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	5,000.00

Schedule # 2—Continued.

Description of piece or parcel of land benefited.	Name of owner.	Benefits.
Part of the Kall tract as follows: Beginning at the northeast corner of Decatur place and 22nd street, thence east 156.27 feet, thence north 40 10 west 242.07 feet, thence south 184.98 feet to the beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	1,000.00
Part of the Kall tract as follows: Beginning at a point of the intersection of the east side of 22nd street with the north boundary of Kalorama Heights subdivision, thence north 29.89 feet, thence east 206.95 feet, thence south 40.10 east 60.54 feet, thence south 50.13 east 108 feet, thence south 23.07 west 59.9 feet, thence in straight line to beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	2,000.00
9 Lot 44, Phelps and Tuttle's subdivision of "Widow's Mite"	Leroy Tuttle	300.
Lot 43, Phelps and Tuttle's subdivision of "Widow's Mite"	Leroy Tuttle	500.
Part of lot 42 of Phelps and Tuttle's subdivision of "Widow's Mite" as follows: Beginning at the southeast corner of said lot 42, thence north 18.9 west 50 feet, thence south 71.51 west 163.37 feet, thence south 21.14 east 21.08 feet, thence east 92.93 feet, thence to the beginning	Leroy Tuttle	1,300.
Part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most northerly corner of said lot 41, thence south 54.08 east 39.3 feet, thence west 102.09 feet, thence in a straight line to the place of beginning	Leroy Tuttle	100.
Part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most easterly corner of lot 41, thence north 54.08 west 224.79 feet, thence west 248.88 feet, thence south 11.02 feet, thence south 40.10 east 242.07 feet, thence east 247.47 feet, thence north 22.07 east 69.91 feet to place of beginning	Leroy Tuttle	7,600.
Part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most southerly corner of said lot 41, thence north 23.07 east 125.43 feet, thence west 171.21 feet, thence south 40.10 east 60.54 feet, thence south 50.13 east 108 ft. to place of beginning	Leroy Tuttle	1,000.

Attested:

AULICK PALMER,
U. S. Marshal,
By W. B. ROBINSON,
Chief Deputy Marshal.

Order Nisi Confirming Verdict, Award, and Assessment of Jury.

Filed Sep. 19, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.
No. 549.

It appearing to the court that on the 30th day of Aug't, 1899, there was filed in this cause the verdict and award of the jury summoned by the marshal under the order heretofore passed herein to ascertain and award damages which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on a plat or map filed with the petition of the Commissioners D. C., and to assess not less than one-half the amount found due and awarded for damages for and in respect of the land condemned for the extension of said S, Twenty-second, and Decatur streets against those pieces or parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which will be benefited by said extension, and that in and by said verdict said jury has found due and awarded as and for damages for and in respect of the land condemned herein, *viz:*

Parts of lot- 41 and 42 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of S and 22nd streets extended, as shown on the map accompanying the petition in this cause, the sum of thirty-six thousand dollars.

Part of lot 41 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of Decatur place extended, as shown on the map annexed to the petition in this cause, the sum of sixteen thousand dollars.

And that in and by said verdict said jury has assessed not less than one-half of the aforesaid amount found due and awarded as and for damages against the following pieces or parcels of land, *viz:*

Against the following-named lots in block 13, Kalorama Heights subdivision:

Lot 1—Charlotte B. Lovett, owner—the sum of one hundred and twenty-five dollars ($125).

Lot 2—A. J. Drexel, owner—the sum of one hundred dollars ($100).

Lot 3—Wm. W. Kurtz, owner—the sum of one hundred dollars ($100).

Lot 4—Randolph Ellis, owner—the sum of one hundred dollars ($100).

Lot 5—Stephen A. Caldwell, owner—the sum of one hundred dollars ($100).

Against the following-named lots in block 12, Kalorama Heights subdivision:

Lot 25—Inez R. Crawford, owner—the sum of one hundred dollars ($100).

Lot 26—John C. Bullitt, owner—the sum of one hundred dollars ($100).

Lot 27—John L. Welsh, owner—the sum of one hundred dollars ($100).

Lot 28—E. J. Stellwagen, owner—the sum of one hundred dollars ($100).

Lot 29—Thos. M. Gale, owner—the sum of one hundred dollars ($100).

Lot 30—Stephen A. Caldwell, owner—the sum of one hundred and twenty-five dollars (125).

Lot 31—A. J. Drexel, owner—the sum of fifty dollars ($50).

Against part of the Kall tract described as follows: Beginning at the intersection of the north line of S street with the east boundary of Kalorama Hts. subdivision, thence east 451.62 feet; thence north
21.14 west 107.2 feet; thence west 461.2 feet; thence south
11 25.50 feet to the place of beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of six thousand dollars ($6,000).

Against part of the Kall tract as follows: Beginning at the southwest corner of S and 22nd street-, west 388.67 —; thence south 25.50 east 88.35 feet; thence south 24.27 east 266.19 feet; thence east 104.73 feet; thence north 195 feet to place of beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of five thousand dollars ($5,000).

Against part of the Kall tract as follows: Beginning at the northeast corner of Decatur place and 22nd street, thence east 156.27 feet; thence north 40.10 west 242.07 feet; thence south 184.98 feet to the place of beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of one thousand dollars ($1,000).

Against part of the Kall tract as follows: Beginning at a point of the intersection of the east side of 22nd street with the north boundary of Kalorama Heights subdivision, thence north 29.89 feet; thence east 206.95 feet; thence south 40.10 east 60.54 feet; thence south 50.13 east 108 feet; thence south 23.07 west 59.9 feet; thence in straight line to beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of two thousand dollars ($2,000).

Against lot 44, Phelps and Tuttle's subdivision of Widow's Mite—Leroy Tuttle, owner—the sum of three hundred dollars ($300).

Against lot 43, Phelps and Tuttle's subdivision of Widow's Mite—Leroy Tuttle, owner—the sum of five hundred dollars ($500).

Against part of lot 42 of Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the southeast corner of said lot 42, thence north 18.09 west 50 feet; thence south 71.51 west 163.37 feet; thence south 21.14 east 21.08 feet; thence east 92.93

feet; thence to the beginning—Leroy Tuttle, owner—the sum of one thousand three hundred dollars ($1,300).

Against part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most northerly corner of said lot 41, thence south 54.08 east 39.3 feet; thence west 102.09 feet; thence in a straight line to the place of beginning—Leroy Tuttle, owner—the sum of one hundred dollars ($100).

Against part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most easterly corner of lot 41, thence north 54.08 west 224.79 feet; thence west 248.88 feet; thence south 11.02 feet; thence south 40.10 east 242.07 feet; thence east 247.47 feet; thence north 22.07 east 69.91 feet to place of beginning—Leroy Tuttle, owner—the sum of seven thousand six hundred dollars ($7,600).

Against part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most southerly corner of said lot (41), thence north 23.07 east 125.43 feet; thence west 171.21 feet; thence south 40.10 east 60.54 feet; thence south 50.13 east 108 feet to place of beginning—Leroy Tuttle, owner—the sum of one thousand dollars ($1,000).

12 It is this 19th day of September, A. D. 1899, upon motion of counsel for the Commissioners of the District of Columbia, ordered that the aforesaid verdict, award, and assessment of said jury in all respects be, and the same is hereby, confirmed unless cause to the contrary is shown on or before the 4th day of October, A. D. 1899, provided a copy of this order be published once in the Washington Law Reporter and twice in the Evening Star before said last-named date; and it is further ordered that the marshal serve a copy of this order personally on all the owners of land condemned and all the owners of land assessed in said verdict, with one-half of the damages awarded therein, who may be found within the District of Columbia, and if not found therein, then by mailing a copy thereof to the place of abode or last known place of residence of such owner or owners.

A. B. HAGNER,
Asso. Justice.

Marshal's Return.

WASHINGTON, D. C., *September* 29, 1899.

Copies of the order hereto attached were served on the following persons personally September 27, 1899, viz:

E. J. Stellwagen, Charles H. Davidson, Albert A. Wilson, John B. Larner, Randolph Ellis, and W. Riley Deeble.

Sept. 25, 1899, copy of said notice served personally on E. J. Stellwagen as agent for Thomas M. Gale, now on the high seas en route from Europe.

Sept. 29, 1899, copy of said notice served personally on Myron M. Parker as agent for Inez R. Crawford, whereabouts unknown.

Sept. 21, 1899, mailed copies of the said notice in postpaid official

envelopes to the following persons at their last known place of residence, viz:

A. J. Drexel, Drexel bldg., Philadelphia, Pa.

Wm. W. Kurtz, Bullitt bldg., Philadelphia, Pa.

Stephen A. Caldwell, Fidelity Trust Insurance and Safe Deposit Co., Philadelphia, Pa.

John C. Bullitt, Bullitt bldg., Philadelphia, Pa.

John L. Welsh, 304 Walnut Str., Philadelphia, Pa.

Sept. 28, 1899, mailed copies of the said notice in postpaid official envelopes to the following persons at their last known place of residence, viz:

Charlotte B. Lovett, Hotel Cedarmere, Coboury, Ontario, Canada.

Le Roy Tuttle, 13 Rutger Str., Utica, N. Y

AULICK PALMER,
U. S. Marshal, D. C.

R.

13 *Exceptions to Award.*

Filed Oct. 4, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of said District. No. 549, Docket No. 2.

Exceptions to the confirmation of the award and finding of the jury in the above-entitled cause as to the owners of the tract of land known and described in these proceedings as the Kall tract.

Now come the respondents, Charles H. Davidson and Albert A. Wilson and John B. Larner, trustees, and except and object to the confirmation of the award and finding of the jury in respect to that tract or parcel of land situate in the county of Washington, District of Columbia, known as the Kall tract, and as more particularly described in the petition and proceedings in this cause, to which reference is hereby made, and to the assessment of damages made by said jury in respect to each and every part and parcel of said tract, because they say:

First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings are had and taken, and by a proper construction thereof no damage can be assessed against said tract of land, or any part thereof, or these respondents as owners of said land.

Second. Because said act is unconstitutional and void, in that it contains no provision for notifying the owners of property to be assessed in advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such as-

sessment might be made effective, and for other vices and defects apparent upon the face of the statute.

Third. Because the statute under which said assessment is made is a statute relating to a condemnation of land solely, and contains no provision touching the assessment of benefits, and was not intended to provide for such assessment.

Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land therefor, and the assessment of benefits is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement as to the assessment of benefits against property forming no part of that sort to be condemned.

Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient, and defective.

14 Sixth. Because said award of damages and finding of the jury in that behalf is excessive, unjust, and unreasonable.

These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be empannelled in accordance with the provision of the statute in such case made and provided.

CHARLES H. DAVIDSON.
ALBERT A. WILSON, *Trustee.*
JOHN B. LARNER, *Trustee.*

B. F. LEIGHTON,
Attorney for Respondents.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, C. Clinton James, a notary public in and for said District, Charles H. Davidson and made oath in due form of law that he is the owner of that certain tract or parcel of land situate in the county of Washington, District of Columbia, known as the Kall tract, subject to a certain deed of trust made to secure a certain indebtedness unto the Washington Loan and Trust Company, in which the respondents hereto, Albert A. Wilson and John B. Larner, are trustees; that, in his judgment, the finding of the jury and their assessment of benefits for said property in these proceedings described as the Kall tract is excessive, unjust, and unreasonable. Especially is this true when it is considered that respondents have donated the land included within the limits of S streets, so far as said Kall tract is concerned, which amounts to somewhere in the vicinity of — square feet of ground. In justice to respondents and the persons whom they represent, said award ought, in the judgment of affiant, to be set aside and for naught held.

CHARLES H. DAVIDSON.

Subscribed and sworn to before me this 4th day of October, A. D. 1899.

[SEAL.]

C. CLINTON JAMES,
Notary Public, D. C.

Motion to Confirm Verdict, Assessment, and Award of Jury.

Filed Oct. 9, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549.

Now come the petitioners herein, The Commissioners of the District of Columbia, and move the court to finally confirm the verdict, award, and assessment of the jury filed herein, notwithstanding the exceptions filed thereto.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys, D. C.

15 To Messrs. B. F. Leighton and J. J. Darlington, attorneys for exceptants:

Please take notice that Mr. Justice Hagner, holding the district court, has set the above motion for hearing on Monday, October 16, 1899, at 10 o'clock a. m.

Very respectfully,

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys, D. C.

Memorandum.

October 30, 1899.—Proofs of publication of order *nisi* in Washington Law Reporter, Washington Post, and the Evening Star, filed.

Motion for Leave to Traverse Marshal's Return & Notice of Motion.

Filed Oct. 31, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of said District. No. 549, Docket No. 2.

Now come the respondents, Charles H. Davidson and Albert A. Wilson and John B. Larner, trustees, by Benjamin F. Leighton, Esq., their attorney, and move the court for leave to traverse the return of the marshal filed in said cause, with the award of the jury, in so far as it states that the owners of that certain tract and parcel of ground, described in said proceedings as the Kall tract, were represented before said jury and in the hearing of said cause by one W. Riley Deeble, and ask leave of the court to file affidavits

in support of this their motion or to submit such proof as the court may direct in verification and support thereof.

B. F. LEIGHTON,
Attorney for Respondents.

Take notice that I will call the above motion to the attention of criminal court No. 2, Justice Cole presiding, on Saturday, Nov. 4th, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

B. F. LEIGHTON,
Attorney for Respondents.

To Messrs. A. B. Duvall and C. A. Brandenburg.

16 *Affidavit of W. Riley Deeble.*

Filed Oct. 31, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION of "S" STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of the said District. No. 549, Docket No. 2.

W. Riley Deeble on oath deposes and says that he is a citizen of the United States and a resident of said District; that he has been doing a general real-estate business in the city of Washington, District of Columbia, for the last fourteen years; that he is the same person who appeared as a witness in the above-entitled cause; that it appears by the return of the marshal accompanying the verdict of the jury in said cause that he, affiant, represented the Kall tract and was present at the taking of the evidence and hearing in said cause. He states that the facts in regard to said cause are, so far as he is concerned, as follows: That at the time said cause was set for hearing he was out of this jurisdiction, and while the cause was in progress, after the jury had viewed the land and taken some testimony, he returned to the city and found that the cause was in progress, and at the request of Mr. Richards and Mr. Duvall, who represented the District in the prosecution of the suit, he appeared in said cause as a witness and in no other capacity or character. He was familiar with the values of property in that vicinity, and it was because of his knowledge as a real-estate agent that he was called into the case. He did not represent in any way or pretend to represent the owners of the Kall tract. Affiant says that he has an undivided sixteenth equitable interest in said property, and that is the extent of his interest in said tract; that the other owners of said property did not request him to appear there for them; that he did not represent them in any way or shape, and did not pretend to so represent them before the jury. He did not consider himself as having any right to cross-examine witnesses or to make any address to the jury, and he did not cross-examine any witness that was produced while he was present in court, nor did he address the

jury, nor did he act in any way in the character of counsel in the case. He considered himself simply in the light of a witness seeking to give the District the benefit of what knowledge he had in respect to values in that vicinity, and especially as he had been instrumental in securing the legislation which resulted in the bill under which these proceedings were instituted. The other equitable owners, except affiant and John C. Davidson, were all out of the city at the time on their summer vacations. Affiant is not advised what the equitable interest of John C. Davidson is; that affiant was only present on Friday, Aug. 25, & Monday, August 28th,
17 and at no other time during the sitting of the said jury or the hearing in said cause. He states further that he consulted with A. B. Duvall, Esquire, at his request, who represented the District in the prosecution of said cause; told him what he could swear to; that an outline of the testimony already given in the case was given to him by Mr. Duvall, and that throughout he acted and was treated simply as a witness in the case of the condemnation of the land belonging to Mr. Tuttle and in no other way or capacity, and so far as the said return states otherwise it is erroneous and not true in point of fact. Further affiant says not.

W. RILEY DEEBLE.

Subscribed and sworn to before me this 31st day of October, A. D. 1899.

CHARLES G. SHOEMAKER,
[SEAL.] *Notary Public.*

Affidavit of John C. Davidson.

Filed Nov. 3, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF "S" STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of the said District. No. 549, Docket No. 2.

John C. Davidson on oath deposes and says that he is a citizen of the United States and a resident of said District; that he has been doing a general real-estate business in the city of Washington, District of Columbia, for the last fourteen years; that he is the same person who appeared as a witness in the above-entitled cause; that it appears by the return of the marshal accompanying the verdict of the jury in said cause that he, affiant, represented the Kall tract and was present at the taking of the evidence and hearing in said cause. He states that the facts in regard to said cause are, so far as he is concerned, as follows: That at the request of Mr. Richards and Mr. Duvall, who represented the District in the prosecution of the suit, he appeared in said cause as a witness and in no other capacity or character. He was familiar with the values of property in that vicinity, and it was because of his knowledge as a real-estate agent

that he was called into the case. He did not represent in any way or pretend to represent the owners of the Kall tract.

Affiant says that he has an undivided seven-thirty-seconds ($\frac{7}{32}$) equitable interest in said property, and that is the extent of his interest in said tract; that the other owners of said property did not request him to appear there for them, and that he did not represent them in any way or shape and did not pretend to so represent them before the jury. He did not consider himself as having any
18 right to cross-examine witnesses or to make any address to the jury, and he did not cross-examine any witness that was produced while he was present in court, nor did he address the jury, nor did he act in any way in the character of counsel in the case. He considered himself simply in the light of a witness seeking to give the District the benefit of what knowledge he had in respect to values in that vicinity. The other equitable owners, except affiant and W. Riley Deeble, were all out of the city at the time on their summer vacations; that affiant was only present on Friday, August 25th, and Monday, August 28th, and at no other time during the sitting of the said jury or the hearing in said cause. He states further that he consulted with A. B. Duvall, Esquire, at his request, who represented the District in the prosecution of said cause; told him what he could swear to; that an outline of the testimony already given in the case was given to him by Mr. Duvall, and that throughout he acted and was treated simply as a witness in the case of the condemnation of the land belonging to Mr. Tuttle, and in no other way or capacity, and so far as the said return states otherwise it is erroneous and not true in point of fact. Further affiant says not.

JOHN C. DAVIDSON.

Subscribed and sworn to before me this third day of November, A. D. 1899.

JOHN E. MITCHELL,
[SEAL.] *Notary Public, D. C.*

Order Confirming Verdict, Award, and Assessment of Jury.

Filed Nov. 18, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549.

This cause coming on to be heard on the exceptions filed by Leroy Tuttle and by Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees, to the written verdict, award, and assessment of the jury filed herein, and it appearing to the court that the order *nisi* confirming said verdict, award, and assessment of said jury has been duly published, as therein provided, and that the owners of the property taken for the extension of said streets and

the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding and of said assessments, as provided by the order of the court heretofore passed herein, it is this 18th day of November, A. D. 1899, by the court, after argument of counsel for the said exceptants and the petitioners, and due consideration of the premises, *adjudged, ordered,* and *decreed* that the aforesaid exceptions be, and the same are hereby, overruled, and that the aforesaid verdict,
award, and assessment be, and the same is hereby, in all re-
19 spects confirmed, and the marshal is hereby directed to
transmit the aforesaid verdict, award, and assessment to the Commissioners of the District of Columbia, in accordance with law.

CHAS. C. COLE,
Asso. Justice.

Notice of Appeal.

Filed Nov. 22, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549.

Now come Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, by B. F. Leighton, Esq., their attorney, and appeal to the Court of Appeals of the District of Columbia from the judgment or decree in the above-entitled case overruling the exceptions to the verdict and assessment of the jury made and filed by them in said case and confirming the same, passed or pronounced herein on the 18th day of November, A. D. 1899.

B. F. LEIGHTON,
Attorney for Charles H. Davidson and A. A. Wilson and John B. Larner, Trs.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549, Dist. Court.

The President of the United States to John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 22d day of November, 1899, wherein Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 22d day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN R. YOUNG, *Clerk.*

20 Service of the above citation accepted this 22 day of Nov., 1899.

A. B. DUVALL,
Attorney for Appellees.

Memorandum.

November 27, 1899.—Appeal bond filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 39, inclusive, to be a true and correct transcript of the record (as prescribed by rule 5 of the Court of Appeals of the District of Columbia) in case No. 549, District court, *In re* extension of S, Twenty-second, and Decatur streets, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, the 9th day of January, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 958. Charles H. Davidson *et al.*, trustees, appellants, *vs.* John B. Wight *et al.*, Comm'rs D. C. Court of Appeals, District of Columbia. Filed Jan. 11, 1900. Robert Willett, clerk.

21 THURSDAY, *April 5th, A. D.* 1900.

CHARLES H. DAVIDSON and A. A. WILSON and JOHN B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 958.

The argument in the above-entitled cause was commenced by Mr. B. F. Leighton, attorney for the appellants, and was continued by Messrs. C. A. Brandenburg and A. B. Duvall, attorneys for the appellees, and was concluded by Mr. B. F. Leighton, attorney for the appellants.

22 CHARLES H. DAVIDSON and A. A. WILSON and John B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 958.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order or decree of the supreme court of the District of Columbia confirming an assessment upon lands of the appellants for alleged benefits accruing from the opening of certain streets adjoining such lands.

By an act approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes" (30 Stat., p. 1344), the Congress of the United States provided that, within thirty days after the passage of the act, the Commissioners of the District should "institute by a petition in the supreme court of the District, sitting as a district court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite; *provided* that the owners of the 'Kall' tract should dedicate the land in said tract contained within the lines of said streets; *and provided further* that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

The act further provided that the proceedings for condemnation should be under and in accordance with chapter 11 of the Revised Statutes of the United States relating to the District of Columbia; that the sum to be assessed against each parcel of ground should be determined by the jury; and that each assessment should be a lien upon the land assessed, and payable in five equal instalments, with interest at the rate of 4 per centum per annum.

In pursuance of the act the Commissioners of the District filed a petition in the supreme court of the District, setting forth in substance the provisions of the act and averring that the owners of the Kall tract had dedicated to the District of Columbia for the purpose of a highway the land in said tract contained within the streets proposed to be extended; and they prayed for process and such further proceedings as were contemplated by the act of Congress. There was no personal service of process upon any of the parties in interest; but on April 3, 1899, the court made an order directing that all persons in interest should appear in court before the — day of that month, and show cause, if any they had, why the prayer of the petition should not be granted. And it directed publication of the order in three specified newspapers published in the city of Wash-

ington. The record contains evidence of publication in two of these three newspapers, but not in the third. It is conceded, however, in the brief filed on behalf of the appellants that due proof of the publication was made as required by the terms of the order.

The next step in the case, so far as the record discloses, appears to have been taken on July 21, 1899, when, on motion of counsel for the Commissioners, the court made an order directing the marshal to summon a jury of seven disinterested persons not related to any party interested in the proceeding, "to be and appear upon the premises described in the petition herein, on a day specified, to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as prayed in said petition, and of the amount found due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less than one-half thereof shall be assessed by said jury against the pieces or parcels of ground situated and lying on each side of the extension of said streets, and also on any and all adjacent pieces or parcels of land which will be benefited by the opening of said streets, and to further proceed in accordance with the act of Congress approved March 3, 1899, entitled 'An act to extend S street in the District of Columbia and for other purposes.'" The latter part of this order, as will be perceived, repeated the specific language of the act of Congress.

Next follows a return made by the marshal of the proceedings had under this order. He recites that he summoned a jury of seven persons, whose names he gives; that these persons were sworn and appeared on the premises on August 24, 1899; that they adjourned to meet next day at the city hall to take testimony in the case; that on August 25, 1899, they took testimony; that on August 28, 1899, they heard evidence and argument of counsel, A. B. Duvall, Esq., appearing on behalf of the Commissioners, J. J. Darlington, Esq., on behalf of Mr. Leroy Tuttle, and W. Riley Deeble representing the Kall tract; that Leroy Tuttle, the owner of the tract to be condemned, had been personally summoned and was present before the jury with his counsel; and that the jury, on August 30, 1899, returned their verdict, which the marshal therewith transmitted to the court. In this verdict the jury found the value of the property to be taken, being about 33,429 square feet, to be of the value of $52,000, and assessed that sum as the amount of damages to be paid as compensation to the owner. At the same time they assessed benefits to the amount of $26,000 on adjacent lots, of which the sum of $10,800 was assessed on Tuttle's remaining property, the sum of $14,000 on four several parcels of the Kall tract held by the appellants as trustees, and an aggregate sum of $1,200 on twelve other pieces of land in the vicinity.

Upon this return of the marshal and verdict of the jury, the court on September 19, 1899, entered an order of confirmation *nisi*, directing that the verdict, award, and assessment should stand confirmed,

unless cause to the contrary were shown on or before October 4, 1899; also, that copies of the order *nisi* should be published in certain specified newspapers in the city of Washington, and that a copy of the order should be personally served by the marshal on all the owners of the land condemned and on all the owners of the land assessed in the verdict, who could be found within the District; and if they could not be found, that a copy should be mailed to their place of abode or last known place of residence.

23 The appellants were duly served with this notice; and they came in and filed exceptions to the confirmation of the award and finding of the jury. The grounds of objection, as stated, were that the statute did not warrant any assessment against the Kall tract; that the statute was unconstitutional inasmuch as it provided for no adequate notice to the persons to be assessed; that the statute under which the assessment was made provided for condemnations only, and not for assessments; that the act of March 3, 1899, taken in connection with the provisions of the Revised Statutes under which the proceedings were had, is inconsistent and incapable of enforcement as to assessments for benefits; that the description of the property sought to be charged with the assessments was defective; and that the award was excessive, unjust and unreasonable. And thereupon they requested that a new jury should be impanneled, in accordance with section 263 of the Revised Statutes of the United States relating to the District of Columbia. The appellants also filed with their exceptions an affidavit of W. Riley Deeble and an affidavit of John C. Davidson, both of whom had appeared as witnesses before the jury for the petitioners, and of whom one W. Riley Deeble was stated in the marshal's return to have appeared on behalf of the owners of the Kali tract. From these affidavits it appeared that neither Deeble nor Davidson, although each owned an equitable undivided interest in the Kall tract, appeared before the jury to represent that tract or its owners.

The exceptions to the award and findings of the jury were overruled; and the court ratified and confirmed the verdict, award, and assessment. From the order of ratification the present appeal has been prosecuted.

The principal questions raised by the assignments of error are two:—1. That of the constitutionality of the act of Congress under which the proceedings have been had; and 2. That of the sufficiency of the notice given to the appellants in respect of the assessments upon their property.

1. With respect to the first of these questions, we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States in the case of Norwood *v.* Baker, 172 U. S., 269. As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of the special benefit which has accrued to him from the public improvement adjacent to his property. The Supreme Court by Mr. Justice Harlan said in the case of Norwood *v.* Baker: "In our judgment,

the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

In that case there had been, it is true, a gross and most unjustifiable attempt by the public authorities of a municipal corporation to take the property of an individual for the purpose of opening a street through it, and thereafter to assess upon his remaining property which abutted on it the whole cost of the property taken and the cost of the condemnation proceedings,—a most shocking case of confiscation and plunder by public authority under the guise of condemnation and taxation. It was an extreme case; but it awakened the courts to a vigorous assertion of the true principle which should govern in all cases of special assessments made for public improvements. And that principle is, as stated in the case of Norwood *v.* Baker, that the value of the special benefit to the adjacent property from the public improvement, and not the cost of the improvement or any part of such cost as such, is the limitation of assessment upon the property. Necessarily, the cost of the improvement is in itself a limitation beyond which the public authorities cannot go in any case; and a proper limit within such limitation beyond which the assessment should not go may well be prescribed by the legislative authority. But it is a logical and necessary consequence from the rule prescribed that the legislative authority may not arbitrarily prescribe a minimum limit below which the assessment may not fall; for the reason that this in itself would be an assessment irrespective of the actual amount of benefit, and the determination of the amount of actual benefit is not a legislative, but a judicial question, upon which the parties in interest are entitled to be heard and to have their day in court.

It is true that, in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made only on property benefited by the improvement, and provides that the assessment shall be made in a judicial proceeding. But it does not leave the question of special benefits to be determined in such proceeding. It arbitrarily finds for itself that the whole adjacent property subject to assessment, or intended to be assessed, will have been specially benefited to the extent at least of one-half of the cost of the improvement; and all that is left to the jury in the judicial proceeding is not to find the value of the special benefit to each adjacent piece of property, but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots. This, we think, is in direct contravention of the principle enunciated in the case of Norwood *v.* Baker, and cannot be supported as a valid exercise of legislative authority.

2. We are likewise of opinion that there was no due process of law in this case, inasmuch as the assessment against the property of the appellants was made without notice to them and without opportunity on their part to be heard in regard to it, such as they were entitled to have.

In the case of Allman *v.* District of Columbia, 3 App. D. C., 20, we held that "seasonable notice at some serviceable stage of the proceedings is absolutely necessary to the validity of an assessment." Now, that there was no personal notice or personal service of process on the owners of the Kall tract or any of them at any time before the issue of the order of ratification *nisi* on September 19, 1899, is conceded, and could not, of course, be reasonably controverted
24 in view of the record before us; and it would be a mere waste of time and words to argue that the notice then given was "seasonable notice at a serviceable stage of the proceedings." It then appeared plain that the appellants should have had their day in court, and should have been heard; but it was too late. The jury, which had been charged with the duty of making the assessment, and before which they were entitled to appear and to adduce their testimony with reference to the only matter of vital importance to them in the proceeding, the value of the special benefit accruing to their property from the public improvement in question, had been discharged; and the privilege which was then accorded of showing why a judgment should not be rendered upon the verdict, is not the equivalent of a proper trial before the verdict. This, as we have said, is too plain to us to waste words upon it; and it should be said on behalf of the appellees that it has not been contended by them that this notice to the appellants was sufficient.

Neither can we regard the statement of the marshal in his return that the owners of the Kall tract were represented before the jury, as sufficient evidence of that fact, in view of the distinct and unequivocal denial of it by the persons who were supposed to have appeared as such representatives, and who show conclusively by their affidavits, which are not sought in any manner to be controverted or questioned, that they appeared before the jury as witnesses summoned on behalf of the District of Columbia, and not as representatives of the Kall tract, or of the appellants in this case. And, of course, such appearance cannot be construed as a waiver of notice on the part of the appellants. The statement of the marshal was evidently based upon some misapprehension of the facts, and cannot be held to be binding upon the parties to the cause.

The reliance of the appellees in this matter of due notice to the appellants is, and in fact their sole reliance must be, upon the order of publication that was issued in the first instance on April 3, 1899, immediately after the filing of the petition, together with the act of Congress itself and the circumstances of that legislation. Now, undoubtedly it is fair to presume that the owners of the Kall tract had some agency in procuring the enactment of the legislation in question; since the proviso that it should become effective only upon their dedication to the public of so much of the land within their tract as was required for the opening of the streets enumerated, implies that representations had been made to Congress on their behalf that such dedication would be made. And that they were aware that a suit was intended to be instituted for the purpose contemplated by the proceedings now before us, is very clear; since they knew that the statute contemplated and directed such a proceeding,

and made it mandatory upon the Commissioners of the District to institute the suit within thirty days after the passage of the act, conditioned only upon the dedication by the appellants, which was promptly made by them. The institution of the suit, in fact, was made dependent upon their act of dedication; and they must have known that the suit would necessarily follow that act. But it is not apparent that they are legally and properly chargeable with knowledge beyond this. They were not made parties to the suit, as they well might have been: they were not notified of its institution: they were not notified of any of the proceedings taken under it, until, as we have said, after the order of ratification *nisi* was passed: and we know of no rule of law that would require them to take notice of its pendency and to make themselves parties to it for the protection of their own interest, unless it was incumbent on them so to do by the notice of publication directed to be issued by the order of April 3, 1899. And so ultimately upon the sufficiency of this order of publication to bring the appellants before the court depends the validity of the subsequent proceedings as to them.

In our opinion, there is nothing in the suggestion that the proceedings were directed by the statute to be had in the supreme court of the District sitting as a district court of the United States, and that such process would thereupon be sufficient as was appropriate in a district court, which would warrant the substitution of a notice of publication in the place of personal service of process. The district courts of the United States do not proceed by notice of publication instead of personal service of process, any more than do other courts, except when they act as courts of admiralty; and even then, though their proceedings are substantially *in rem*, rather than *in personam*, they can scarcely, in view of the circumstances, be regarded as exceptional. If they were, they would afford no warrant for the present proceeding; for the district court has much other jurisdiction than that of admiralty, in which notice of publication is not to be thought of for a moment as a legal substitute for personal service of process. Notice of publication in modern practice is a purely statutory device to enable the courts of justice to reach property within their jurisdiction when the parties in interest are beyond their jurisdiction and cannot be reached by personal process, the ordinary common law and inalienable right of all persons under ordinary circumstances. And when the statute authorizes such extraordinary process it is usually cumulative, dependent upon the previous issue of the ordinary process, the return of that process unserved, and allegation and proof that the party against whom it has been issued is beyond the jurisdiction of the court. But, unless we except the courts of admiralty, we know of no warrant in our system of jurisprudence for the substitution of notice by way of publication in a newspaper in the place and stead of the due process of law, beginning with personal service of notice, which is guaranteed to every individual by the common law and by our Federal Constitution.

We do not mean to say that there may not be cases in which, by the nature of an alleged public improvement, all parties, whose

property would be affected by it, would be chargeable with notice of its proposed construction, its incidents and consequences; and in which possibly a general notice by way of publication in a newspaper would be all the notice which the circumstances would reasonably allow or acquire. These are cases in which all persons interested would naturally be put upon notice. But the present is not such a case.

Here there was nothing whatever to put the appellants, or any one else, upon notice that their property would be assessed. Neither the appellants nor any other owner of property in the neighborhood could tell with any certainty that their or his property was to be assessed. There was no taxing district fixed by the statute. Whether any such taxing district could arbitrarily have been fixed, in view of the decision in Norwood *v.* Baker, we need not determine. The statute simply provided that not less than one-half of the amount to be paid for the Tuttle land required for the extension of the proposed streets should be assessed by the jury in the proceedings "against the pieces or parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets;" and from this it is very plain that no one could know, in advance of the action of the jury, what property would be declared to be benefited by the proposed extension of the streets. It is impossible even now upon the record to determine upon what theory of benefits the jury proceeded, further than they deemed themselves compelled by the statute to assess the sum of $26,000, which they found to be one-half of the value of the property taken by condemnation, upon the neighboring property, and to find sufficient property to make up that amount. But it is not apparent why they stopped in the middle of the block; and why, for instance, lot 5, in block 13, in Kalorama was assessed, and lot 6, in the same block 13, was not assessed, when the difference in benefit to the two is utterly impossible to be appreciated; or why, on the south side of the street, lot 25, in block 12, is assessed, and the immediately adjoining lot 24 is not assessed. This is not said in criticism of the jury, the members of which no doubt acted honestly upon their best judgments. But it shows very plainly the impossibility of the determination by any one, in advance of the action of the jury, that he was within the area of assessment, and therefore that he was bound by the proceedings under the general notice given by way of publication. The owners of lot 6, in block 12, and of lot 24, in block 13, and of the lots west of them, had just as much reason as their neighbors to the east of them at the time of the institution of the proceedings to suppose that they were within the scope of assessment; and the opportunity to parties to be heard in defense of their rights cannot be left to depend on any such uncertainty as is here indicated. Unless it appears very plainly from the notice of publication that the appellants were included in it, and must have known from it that they would necessarily be assessed,

we cannot see upon what principle of sound reasoning they can be held bound by that notice.

There is nothing in the statute to justify the omission of the ordinary personal notice; nor was there anything in the circumstances of the case to warrant it. If it was subsequently required by the order of ratification *nisi*, it must have been upon the ground that it was both proper and necessary. It was then had without difficulty; and there is nothing in the record to suggest that it might not have been had equally well in the first instance. Even if, when the jury had determined that the property of the appellants had been benefited and would be assessed, notice had then been given to them and they had been cited to appear and offer testimony, if any they had, and they could have been heard before the jury upon the question of assessment, it may be that they would have had the due process of law to which they were entitled. That they did not have this due process, we are compelled to hold.

From what we have said it follows, in our opinion, that there was error in the order or decree of confirmation of the award and findings of the jury in this case, and that, as against the appellants, such award and findings were not warranted by law. The order or decree appealed from will therefore be as to them reversed; and the cause will be remanded to the supreme court of the District of Columbia, with directions to vacate as to them such order or decree, and its order of confirmation *nisi*, and the award and findings of the jury; and for such other proceedings therein, if any, as may be proper according to law and not inconsistent with this opinion.

And it is so ordered.

26 WEDNESDAY, *April 25th, A. D.* 1900.

CHARLES H. DAVIDSON and A. A. WILSON and John B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. Beach, Commissioners of the District of Columbia.

No. 958.
April Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order or decree of the said supreme court appealed from in this cause be, and the same is hereby, reversed as to the appellants, and that this cause be, and the same is hereby, remanded to the said supreme court, with directions to vacate as to the appellants such order or decree and its order of confirmation *nisi* and the award and findings of the jury, and for

such other proceedings therein, if any, as may be proper according to law and not inconsistent with the opinion of this court.

Per MR. JUSTICE MORRIS.

April 25, 1900.

27 TUESDAY, *May 8th, A. D.* 1900.

CHARLES H. DAVIDSON and A. A. WILSON and JOHN B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 958.

On motion of Mr. A. B. Duvall, for the appellees, it is ordered by the court that said appellees be, and they are hereby, allowed an appeal to the Supreme Court of the United States.

28 UNITED STATES OF AMERICA, *ss:*

To Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 8th day of May, in the year of our Lord one thousand nine hundred.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
B. F. LEIGHTON.

29 [Endorsed:] Court of Appeals, District of Columbia. Filed May 10, 1900. Robert Willett, clerk.

30 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from one to twenty-nine, inclusive, contain a full, true, and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, appellants, *vs.* John B. Wight, John W. Ross, and Lansing H. Beach Commissioners of the District of Columbia, No. 958, April term,

1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of May, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,765. District of Columbia Court of Appeals. Term No., 283. John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, appellants, *vs.* Charles H. Davidson & A. A. Wilson & John B. Larner, trustees. Filed May 15th, 1900.

No. 283.

FILED
OCT 5 1900
JAMES H. MCKENNEY
Clerk

Bf. & Duvall & Brandenburg

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 5, 1900.

No. 283.

JOHN B. WIGHT, JOHN W. ROSS AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

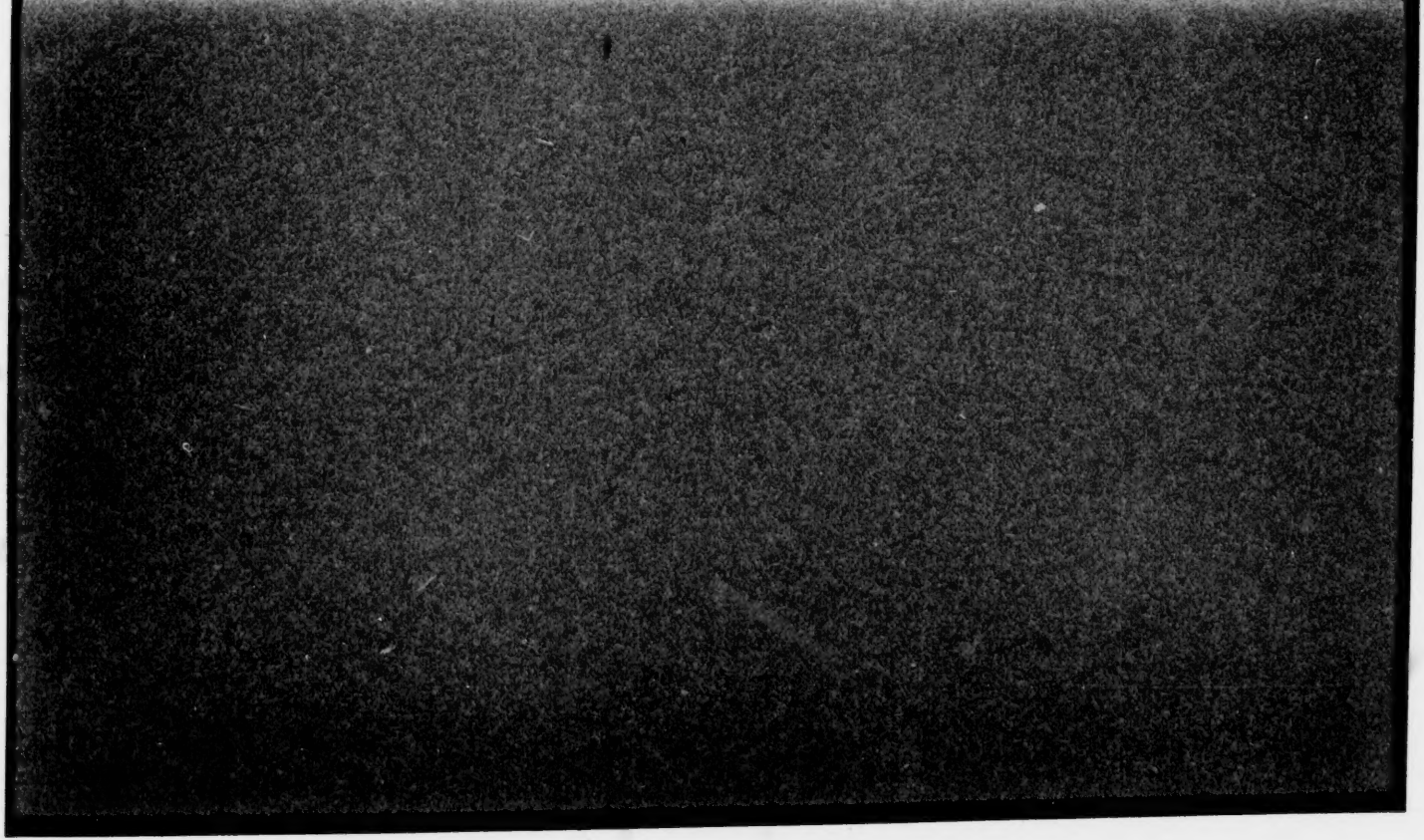
vs.

CHARLES H. DAVIDSON, A. A. WILSON AND JOHN B. LARNER, TRUSTEES.

BRIEF FOR APPELLANTS.

ANDREW B. DUVALL,
CLARENCE A. BRANDENBURG,
Attorneys for Appellants.

JUDD & DETWEILER, PRINT.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 283.

JOHN B. WIGHT, JOHN W. ROSS AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. DAVIDSON, A. A. WILSON AND JOHN B. LARNER, TRUSTEES.

STATEMENT OF FACTS.

On March 2, 1893, by an act entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of the city" (27 Stat. at L. 532, Chap. 197), provision was made for the extension of highways to the boundary line of the District. This plan involved the condemnation of land embraced within the lines of the streets as laid out upon plans made pursuant to said act. After proceedings were begun under this act, it was found that the revenues of the District and the needs of the people did not justify carrying out immediately so extensive and expensive a plan. Accordingly, so much of said act of Congress as required the condemnation of lands necessary for the purposes of the highways thus laid out was repealed by the act of Congress approved June 28, 1898. Certain sections of the original act, which required the preparation of plans, recording thereof, etc., were continued in force, and, pursuant thereto, plans of proposed

extension of streets to the District line have been prepared from time to time, and duly approved and recorded.

The plan of gradually extending the streets, as the necessities of the situation required, was then adopted, and in pursuance thereof, Congress passed three acts during the closing days of the last session of the Fifty-third Congress, providing for opening, extending and widening of thirteen different streets (act approved February 25, 1899, being "An act for the widening of Nineteenth street northwest;" act approved March 3, 1899, entitled "An act to extend S street in the District of Columbia, and for other purposes;" and an act approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes").

The last two of the foregoing acts provided for the extension, widening or opening of twelve different streets, and are apparently hurried consolidations of various bills then pending.

By the provisions of section 1 of the act of Congress approved March 3, 1899 entitled "An act to extend S street in the District of Columbia, and for other purposes," above mentioned, the appellants, Commissioners of the District of Columbia, were authorized and directed to institute by petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights within thirty days after the passage of the act, provided the owners of the "Kall" tract would dedicate the land in said tract contained within the lines of said streets.

The owners of the "Kall" tract having dedicated to the District of Columbia for highway purposes the land in said tract contained within the lines of said streets as proposed to be extended, and within thirty days after the passage of the act, the Commissioners instituted the proceedings now

before this court for review. On April 3, 1899, the Supreme Court of the District of Columbia, passed its order (page 2 of the Record) directing all persons interested in the proceeding to appear on or before a day fixed and show cause, if any, why the prayer of the petition for a jury to assess the damages to the owner of the land to be taken and to assess not less than one-half thereof as benefits, as in the act of Congress provided, should not be granted. By the terms of the order the notice was published in the Washington Post and Washington Times, newspapers of general circulation in the District of Columbia, and in The Washington Law Reporter, and due proof of such publications was filed in the case. No objection having been made, on July 21, 1899, the court passed its order (Rec., p. 3) directing the marshal to summon a jury to proceed with the condemnation of the land and to make the assessments. The jury was duly summoned and sworn, and, after viewing the premises, began the taking of testimony on August 29, 1899, and continued to do so from day to day until the hearing was closed. The return of the marshal shows that arguments were heard on behalf of the petitioners and on behalf of the owners of the "Kall" tract, the appellees in this proceeding. Among the witnesses examined were W. Riley Deeble and John C. Davidson, equitable owners of undivided interests in the "Kall" tract. The jury awarded as damages the sum of $52,000, and, as required by the act of Congress under which the proceedings were had, assessed one-half of said amount, as benefits, against the pieces and parcels of land situate and lying on each side of the extension of said street, and also on adjacent pieces or parcels of land which they found would be benefited by the extension of said streets, including, among others, the land of the appellees.

On September 19, 1899, the court passed its order *nisi* (Rec., p. 10), confirming the verdict, award and assessment of the jury unless cause to the contrary should be shown on

or before October 4, 1899. By the terms of the order it was required to be published in The Washington Law Reporter and in the Evening Star, a newspaper of general circulation in the District of Columbia, and due proof of such publication was filed in the cause. On the 4th day of October, 1899, the appellees filed exceptions to the award (Rec., p. 12). On October 9, 1899, the Commissioners of the District of Columbia moved the court to finally confirm the verdict, award and assessment of the jury notwithstanding the exceptions filed; thereupon the appellees moved the court for leave to traverse the return of the marshal, in so far as it recited that W. Riley Deeble appeared in said proceedings on behalf of the owners of the "Kall" tract, and filed affidavits in support (Rec., pp. 16, 17).

This motion was not called to the attention of the court, and no action was had thereon. As hereafter shown, the Court of Appeals of the District of Columbia proceeded on the theory that the averments of the affidavits filed in support of said motion were true, and that the return of the marshal was incorrect. The exceptions of the appellees to the award and assessment, and the motion of the Commissioners, appellants herein, for its confirmation came on to be heard together before the justice of the Supreme Court of the District of Columbia, holding a District Court, and on November 18, 1899, that court overruled the exceptions of the appellees and confirmed the verdict, award and assessment of the jury. From that order the present appellees prosecuted an appeal to the Court of Appeals of the District of Columbia. That court on April 25, 1900, reversed the order or decree of confirmation of the award and findings of the jury, and remanded the case to the Supreme Court of the District of Columbia with directions to vacate such order or decree and findings of the jury as to the present appellees, on two grounds:

First. Because the provisions of the act of Congress in question requiring the assessment of one-half of the cost of

the improvement, as benefits, against adjacent property, was unconstitutional and void for the reason, as stated in the opinion—

> "The legislative authority can not arbitrarily prescribe a minimum limit below which the assessment may not fall, as that in itself would be an assessment irrespective of the actual amount of benefit, and the determination of the amount of actual benefit is not a legislative but a judicial question upon which the parties in interest are entitled to be heard and to have their day in court."

And, secondly, because the act of Congress in question failed to provide due process of law in that it contained no provision for the personal service of notice upon persons whose lands were found to be benefited. From this decree of the Court of Appeals, this appeal has been prosecuted.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred—

1. In holding that the provisions of section 1 of the act of Congress approved February 25, 1899, in relation to the assessment of benefits are unconstitutional and void.

2. In holding that it is beyond the power of Congress to prescribe a minimum limit below which the assessment of benefits for a public improvement may not fall.

3. In holding that the determination of the amount of actual benefit resulting from a public improvement is not a legislative but a judicial act.

4. In holding that the act of Congress in question is unconstitutional and void because it fails to prescribe due process of law for the persons whose lands are to be assessed for benefits.

5. In finding and holding that as to the appellees in this case, there was not due process of law.

ARGUMENT.

Section 1 of the act of Congress "to extend S street in the District of Columbia and for other purposes," approved March 3, 1899, 30 Stat. 1344, provides as follows:

> "That within thirty days from the passage of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary to open and extend S, 22d and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: Provided, That the owners of the "Kall" tract dedicate the land in said tract contained within the lines of said streets: And provided further, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

Section 5 provides:

> "That the proceedings for the condemnation of said land . . . shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of land in said District for public highways."

Section 7 provides:

> "That the sums to be assessed against each lot or piece or parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular

piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of said streets."

The Court of Appeals of the District of Columbia, resting its conclusion upon the decision of this court in Norwood *vs.* Baker, 172 U. S. 269, held this provision to be unconstitutional, and in connection therewith used the following language:

> "It [referring to Norwood *vs.* Baker] was an extreme case; but it awakened the courts to a vigorous assertion of the true principle which should govern in all cases of special assessments made for public improvements. And that principle is, as stated in the case of Norwood *vs.* Baker, that the value of the special benefit to the adjacent property from the public improvement, and not the cost of the improvement or any part of such cost as such, is the limitation of assessment upon the property. Necessarily, the cost of the improvement is in itself a limitation beyond which the public authorities can not go in any case; and a proper limit within such limitation beyond which the assessment should not go may well be prescribed by the legislative authority. But it is a logical and necessary consequence from the rule prescribed that the legislative authority may not arbitrarily prescribe a minimum limit below which the assessment may not fall; for the reason that this in itself would be an assessment irrespective of the actual amount of benefit, and the determination of the amount of actual benefits is not a legislative, but a judicial question, upon which the parties in interest are entitled to be heard and to have their day in court. It is true that in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made only on property benefited by the improvement, and provides that the assessment shall be made in a judicial proceeding. But it does not leave the question of special benefits to be determined in such proceeding.

> It arbitrarily finds for itself that the whole adjacent property subject to assessment, or intended to be assessed, will have been specially benefited to the extent of one-half of the cost of the improvement; and all that is left to the jury in the judicial proceeding is not to find the value of the special benefit to each adjacent piece of property, but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots. This, we think, is in direct contravention of the principle enunciated in the case of Norwood *vs.* Baker, and can not be supported as a valid exercise of legislative authority."

It is obvious that this judgment of the Court of Appeals of the District of Columbia, now presented for review, involves for determination a question of the utmost importance, not only in the District of Columbia, but throughout the United States, and it will become necessary for this court to determine how far its previous decisions have been affected by the judgment of the court in Norwood *vs.* Baker, for it is apparent that the Court of Appeals of the District of Columbia and a number of other courts throughout the United States are of opinion that Norwood *vs.* Baker is a reversal of former cases.

The Act of Congress for the Extension of S Street is Constitutional.

In determining the constitutionality of the act of Congress under consideration, it is proper to consider in their order the elements necessary to its validity, and, incidentally, the correctness of the views of the Court of Appeals of the District of Columbia thereon.

We submit that the following propositions are established by the decisions of this court and of other courts, viz.:

1. That Congress may determine what proportion of the cost of a public improvement shall be assessed against the property specially benefited thereby.

2. That Congress itself may fix the taxing area or commit the duty to a tribunal created by it.

3. That Congress itself may prescribe the rule of apportionment of special benefits or commit the duty to a tribunal created by it, and that *if the rule so prescribed is actual benefits received,* the law is constitutional.

CONGRESS MAY DETERMINE WHAT PROPORTION OF THE COST OF A PUBLIC IMPROVEMENT SHALL BE ASSESSED AGAINST THE PROPERTY SPECIALLY BENEFITED THEREBY.

Section 5 of the act of Congress, the validity of which is now involved, provides:

> "That the proceedings for the condemnation of said land . . . shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia which provide for the condemnation of land in said District for public highways."

The provisions of chapter XI of the Revised Statutes referred to in said section relate exclusively to the condemnation of land and contain no provisions whatever for the assessment of benefits. So far as the taking of land pursuant to the provisions of the act under consideration is concerned, no question is raised. The property has been taken and paid for.

The first section of the act, heretofore quoted, provides:

> "That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

Section 7 provides as follows:

> "That the sums to be assessed against each lot or piece or parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of said streets."

This act of Congress specifically requires that "not less than one-half" of the cost of the extension of the street—

> "shall be assessed by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension, and *also* on all or any adjacent pieces or parcels of land *which will be benefited* by the opening of said street."

The Court of Appeals on the other hand says:

> "That the legislative authority *may not* arbitrarily prescribe a minimum limit below which the assessment may not fall . . . and the determination of the amount of actual benefit *is not* a legislative but a judicial question."

The issue therefore is very decided and clear.

In considering the validity of this provision it is important to bear in mind what this court has repeatedly said in reference to the relation between the Congress of the United States and the District of Columbia.

> "The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia."
>
> Parsons *vs.* Dist. of Col., 170 U. S. 45.

It will also be borne in mind, what this court has stated on several occasions, that the provision relating to the assessment of benefits is the exercise of the power of taxation and is quite different from the exercise of the right of eminent domain.

As held by this court in Bauman *vs.* Ross, 167 U. S. 588, in considering the provisions of the Highway Extension Act relating to the assessment of benefits:

> "The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court."

This court has on more than one occasion sustained the validity of laws of the same nature and possessing identically the same elements as the case now under consideration, and has specifically sustained the right of Congress to determine what proportion of the cost of a public improvement shall be assessed against property specially benefited, and we submit those cases must control this case, *unless* the decision of this court in Norwood *vs.* Baker is a reversal of such former decisions, which we deny. That feature will be hereafter considered.

In Spencer *vs.* Merchant, 125 U. S. 345, this court had under consideration an act of the legislature of New York, passed in 1881, directing the assessment of the *entire cost* of the opening of a street remaining unpaid, together with a proportional part of the expenses of making the assessment, with interest, to be levied upon certain *specified property.* There were contentions similar to those made here, in opposition to the validity of the act. The Court of Appeals of the State of New York sustained the act, and its decision was affirmed by this court. This court, quoting with approval from the decision of the Court of Appeals of New York, said:

> "The act of 1881 determines *absolutely* and *conclusively* the *amount of tax* to be raised and the *property to be assessed*, and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action can not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review."
>
> . . . . . .
>
> "The legislature in the exercise of its power of taxation has the right to direct the *whole* or a *part* of the expense of a public improvement, such as the laying out, grading or repair of a street, to be assessed upon the owners of lands benefited thereby and the determination of the *territorial district* which should be taxed, for a local improvement is within the province of legislative discretion."

In Parsons *vs.* District of Columbia, 170 U. S. 45, this court sustained the validity of an act of Congress which required an amount in excess of the total actual cost of a public improvement to be assessed against abutting property at the rate of $1.25 per linear front foot of abutting property.

The Court of Appeals of the District of Columbia itself, in the majority opinion of the court, sustained the validity of the provision of the Highway Extension Act, requiring the assessment of one-half of the cost of extending a street against adjacent property, and that much of the opinion, at least, was affirmed by this court in the same case, with others on review.

Bauman *vs.* Ross, 167 U. S. 584.

The Court of Appeals said:

> "In so far as the general principle of the assessment established by section 15 of this act is concerned, there can be *no substantial objection.* It *is fair, liberal and regular. One-half only of the cost,* and that payable in five annual instalments, is to be assessed against the property found to be benefited by the improvement in proportion to the benefits by each tract received. The benefits are not apportioned by an arbitrary rule of frontage, area or neighborhood; but are to be ascertained by a jury under the direction and supervision of a competent court, with the same right to appeal as in other cases."
>
> District of Columbia *vs.* Armes, 8 App. D. C. 412.

Yet that court now says in the case at bar—

> "that the legislative authority *may not* arbitrarily prescribe a minimum limit below which the assessment may not fall."

In Hagar *vs.* Reclamation District, 111 U. S. 702, this court said:

> "Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure."

In Cooley on Taxation, page 447, the following conclusions from many authorities are cited:

> "1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "2. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "3. *The whole cost in other cases is levied on lands in the immediate vicinity of the work.*"

> "*In a constitutional point of view either of these methods is admissible*, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is *legislative*, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible, arbitrary rule."

The whole subject of street extensions and the validity of the provisions of laws relating to the assessment of benefits in the District of Columbia ought to be considered as finally settled for this jurisdiction since the decision of this court in Bauman *vs.* Ross, 167 U. S. 584, in which the history of the legislation upon the subject of assessments for benefits and of judicial decision thereon was carefully reviewed. It would serve no useful purpose to quote at length from that decision. As bearing, however, upon the particular question under consideration, we desire to quote briefly.

As above shown, the Court of Appeals expressly held—

> "that the legislative authority can not arbitrarily prescribe a minimum limit below which the assessment may not fall"—

and that "the determination of the amount of actual benefits *is not* a *legislative* but a judicial question." Not only is such holding contrary to authorities generally, but is in direct conflict with the conclusions of this court on the appeal from the Court of Appeals of the District of Columbia. This court in Bauman *vs.* Ross, referred to, page 589, said:

> "But it is for the legislature, and not for the judiciary to determine whether the expense of a public improvement should be borne by the whole State, or by the district or neighborhood immediately benefited.

"The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court. . . .

"The legislature, in the exercise of the right of taxation, *has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or repair of a street, to be assessed upon the owners of lands benefited thereby.* Davidson *vs.* New Orleans, 96 U. S. 97; Hagar *vs.* Reclamation District No. 108, 111 U. S. 701; Spencer *vs.* Merchant, 125 U. S. 345; Walston *vs.* Nevin, 128 U. S. 578, 582; Illinois C. RR. Co. *vs.* Decatur, 147 U. S. 190, 198, 199; Paulsen *vs.* Portland, 149 U. S. 30. This authority has been *repeatedly exercised* in the District of Columbia by Congress, with the sanction of this court. Willard *vs.* Presbury, 81 U. S. 676; Mattingly *vs.* Dist. of Col., 97 U. S. 687; Shoemaker *vs.* United States, 147 U. S. 282. . . . ."

The apparent justification for the decision of the Court of Appeals, in direct conflict with the decision of this court in Bauman *vs.* Ross, is the later decision in Norwood *vs.* Baker; but the Court of Appeals, from the beginning to the end of its decision cites no authorities whatever, aside from Norwood *vs.* Baker, (except Allman *vs.* District of Columbia, on the subject of notice), and makes no mention of the decision in Bauman *vs.* Ross, as if the two were irreconcilably in conflict. And this, we respectfully argue, is not true.

We therefore respectfully submit that Congress had the power to determine what part of the cost of extending S street should be assessed against property specially benefited thereby.

Congress May Itself Determine the Taxing Area or Commit the Duty to a Tribunal Created by it.

Upon the question as to the right of Congress to either determine itself the taxing area or to commit it to a tribunal created by it, we think there can be no doubt.

In Dillon's Municipal Corporations, Vol. 2, Sec. 752, (4th edition), the conclusions reached are thus expressed:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

In Cooley on Taxation, page 447, the author says:

> "The whole cost in other cases is levied on lands in the immediate vicinity of the work.
>
> "In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible arbitrary rule."

In Bauman *vs.* Ross, *supra*, where the act of Congress contained a provision for the assessment of benefits without specifically limiting the taxing area, it was argued that the act was unconstitutional for that reason. In this case it was argued below that the act of Congress involved in the case at bar is invalid because it *does* limit the taxing area to a certain extent. In answer to the argument this court said (p. 288):

> "It was argued that section 15 was too uncertain to be put in execution, because it failed to define the district or territory within which the benefits might be assessed, and did not even specify whether the assessment should or should not be confined to lands within the particular subdivision in which a new highway was established. But in either alternative the assessment could not include lands outside of the District of Columbia; and the section would be equally constitutional whether the district of assessment was the particular subdivision or the whole District of Columbia. And there does not appear to be any insufficiency as to which alternative was in the contemplation of Congress. The lands to be assessed being described generally as 'the lands benefited' by the condemnation and establishment of the new highway or by the abandonment of an existing highway, and again as the 'property thereby benefited,' and as the lands which the jury 'find to be benefited,' without any words of restriction to lands in the particular subdivision, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment. The question, what parcels of lands within the district so ascertained are benefited, and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited, be committed by Congress to the determination of the tribunal intrusted with the authority of making this assessment."

In the same case this court said (p. 288):

> "The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. Spencer *vs.* Merchant, and Shoemaker *vs.* U. S., above cited; Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112, 167, 168, 175;

> Ulman *vs.* Baltimore, 165 U. S. 719. See, also, the very able opinion of the Court of Appeals of New York, delivered by Judge Ruggles, in Payne *vs.* Brooklyn, 4 N. Y. 419, 430."

We therefore submit, in view of the foregoing authorities, that the provision of the act of Congress under consideration, whereby the taxing area was in part defined by Congress, and in part committed to the jury, is valid.

Congress itself may Prescribe the rule of Apportionment in the Taxing District or leave it to a Tribunal Created by it, and if the Basis of Apportionment is Actual Benefits Received, the Act is Valid.

It is apparent, we submit, in view of the foregoing authorities, that no well founded objection can exist to the act of Congress under consideration because it fixed what part of the cost of extending S street should, at least, be assessed as special benefits. If that be true, it is very clear that the question at the very bottom of the matter is whether the act of Congress arbitrarily required the apportionment of one-half the cost of the improvement on adjacent land *irrespective of actual benefit*; and if it did not, and the rule of apportionment, fairly ascertainable from the act itself, *is actual benefit*, then the law is unquestionably valid.

Congress may itself determine the rule of apportionment or commit it to a jury.

> "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by Commissioners. Mattingly *vs.* Dist. of Col., Spencer *vs.* Merchant, Walson *vs.* Nevin, Shoemaker *vs.* U. S., Paulsen *vs.* Portland, and Fallbrook Irrig. Dist. *vs.* Bradley, above cited."
>
> Bauman *vs.* Ross, p. 288.

What, then, is the rule of apportionment prescribed by the act of Congress?

The Court of Appeals in its opinion (Rec., p. 23), said:

> "It is true, that, in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made *only* on *property benefited* by the improvement and provides that the assessment shall be made in a judicial proceeding."

What was the occasion for a recognition of the principle in this act of Congress unless it was to control? We read the entire law to ascertain the intention of Congress, and if an intention appears which accords with constitutional rights, why should not that intention control? It is a cardinal rule of construction that if an act of Congress is susceptible of two constructions, one which supports and the other defeats its constitutionality, that which supports the validity of the act will be adopted.

We earnestly contend, however, that the several sections of the act relating to the assessment of benefits, not doubtfully, but clearly required the asssessment in this case to be according to actual benefits.

This is apparent from several provisions of the act. Section 1 provides for the assessment against the pieces and parcels of land which will be benefited by the opening of the streets. Section 7 provides that in determining WHAT amount (thus leaving open the amount) should be assessed against *any* particular piece or parcel of ground the jury should take into consideration the situation of the lots "and the *benefits* that they may severally *receive* from the opening of the streets." The sections of the act quoted clearly indicate that it should be left to the jury to determine not whether land on each side of the street was in fact benefited, but the extent of such benefits. If it was otherwise, the act itself would have fixed the amount of the assessment to be borne by each parcel of land, and would

not have required the jury to take into consideration the situation of the land and the *benefits* that it would receive from the opening of the street.

In the respects mentioned the provision of this law is in no essential particular different from the provisions in the Highway Extension Act, considered and approved by this court in Bauman *vs.* Ross. Considering this particular provision, the court in that case said:

> "Nor can we entertain any serious doubt as to the *rule of assessment* which is to govern. The directions that the jury shall ascertain and determine what property is benefited by the establishment of the highway, and 'shall assess against each parcel which it shall find to be so benefited its proper proportional part of' the whole sum directed to be assessed, making due allowance, when part only of a tract has been taken, for any deduction already made, in the assessment of damages for such taking, 'on account of the benefit to the remainder of the tract,' reasonably, if not necessarily imply that the assessment is to be proportional to the benefit, and not to the market value or any other test; and are equivalent to the words in the Rock Creek Park Act, directing lands in the District of Columbia to be assessed, 'as nearly as may be, in proportion to the benefits resulting to such real estate.' Act of September 27, 1890 (26 Stat. at Large 493, Chap. 1001, Sec. 6); Shoemaker *vs.* United States, 147 U. S. 282, 286, 302."

It is apparent, therefore, from the foregoing authorities, that the provisions of this law, which fixed the proportion of the expense of opening this street, to be assessed as benefits against adjacent property are constitutional and valid, unless this court, in Norwood *vs.* Baker has changed or reversed this rule of law. It therefore becomes important to consider and review the case of Norwood *vs.* Baker.

The Case of Norwood vs. Baker.

Whether justified or not, the recent decision of this court in Norwood *vs.* Baker, 172 U. S. 269, has produced consternation among many municipalities throughout the United States, and in a number of States has caused a departure from former rulings. Its effect, as understood by the Court of Appeals of the District of Columbia (as erroneously understood, we contend), is apparent in this case.

The court, in its opinion, said (Rec., p. 22):

> "With respect to the first of these questions [the constitutionality of the act], we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States in the case of Norwood *vs.* Baker, 172 U. S. 269. As we understand the decision, *which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments,*" etc.

The suit referred to was brought by the plaintiff Baker in the Circuit Court of the United States for the Southern District of Ohio to enjoin the enforcement of a special assessment, on the ground that it violated the Fourteenth Amendment to the Constitution of the United States. The Supreme Court on this point said (p. 277):

> "The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio."

The following proposition was laid down by the court (p. 279):

> "In our judgment, the exaction from the owner of private property of the cost of a public improve-

> ment in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

The Supreme Court expressly placed its decision upon the ground that the assessment violated the Fourteenth Amendment to the Constitution of the United States, saying (p. 296):

> "We have considered the question presented for our determination with reference only to the provisions of the national Constitution."

The court, however, added (p. 296):

> "But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the Constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed 'without deduction for benefits to any property of the owner,' would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits."

At the conclusion of its opinion the court announced its decision in the following words (p. 297):

> "The judgment of the Circuit Court must be affirmed upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered."

The statutes of Ohio under consideration provided that the assessment of benefits should be made by the council on the abutting and adjacent property, or other property benefited, *either* in proportion to the benefits which may result from the improvement, *or* according to the value of the property assessed, *or* by the front foot of the property bounding and abutting upon the improvement as the council might determine. The ordinance of the village of Norwood, providing for the opening of the street through the land of Baker, provided that the expense of the condemnation should be assessed "*per front foot* upon the property bounding and abutting on the street opened." Neither the ordinance passed before the verdict of the jury condemning the land nor the ordinance passed after the finding of the jury and levying the assessment, made any provision whatever in reference to benefits. They undertook to require the assessment of the total cost of the public improvement, with the expenses of the proceeding to be assessed on the land of Baker wholly *irrespective of the benefits received.*

The portion of the opinion to which we invite special attention is that portion wherein this court said:

> "The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one. . . . The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, *without any reference to special benefits.*"

This court has by that case therefore held that it is contrary to the Fourteenth Amendment to the Constitution for a State, or a municipality in a State, to assess the cost of laying out a public street, *by the front foot*, upon the land abutting such street by a *rule* of apportionment which *disregards the actual benefits* received. That is the sum and

substance of the decision as we understand it. If that be true, it is *not* in conflict with the decision in Bauman *vs.* Ross, where this court found the benefit rule of apportionment to exist, and, as the rule of apportionment in this case is special benefits received, as we have shown, Norwood *vs.* Baker does not control, but the decision of this court in Bauman *vs.* Ross. We confidently submit that if the town of Norwood had adopted the rule of apportionment or assessment authorized by the statutes of Ohio, to wit, "in proportion to the benefits which may result from the improvement," instead of the alternative rule authorized by the same act, to wit, "per front foot upon the property bounding and abutting on the street opened," as it did, the act would not have been obnoxious to constitutional objections even if the total cost had been assessed against the property of Mrs. Baker, as was done.

This court did not intend and did not, in fact, reverse or depart from the rule laid down in Bauman *vs.* Ross. In the former case, the cost of the improvement was assessed, irrespective of benefits, in the latter, according to benefits. In the former, this court said it was a—

> "case . . . under a *rule* or *system* which violated the Constitution, in that the entire cost . . . was imposed . . . *without any reference to benefits.*"

In the latter case this court said:

> "Nor can we entertain any serious doubt as to the *rule of assessment*; . . . that the assessment is to *be proportional to the benefit.*"

Any other view of the case of Norwood *vs.* Baker would, indeed, justify the claim that it is contrary to principle and precedent. Indeed, even considering it as deciding what we have stated, many reviewers insist that, in so far as this court holds the Fourteenth Amendment implies restrictions upon State legislative bodies as respects assessments, it is contrary to principle and precedent.

See Harvard Law Review, May and June, 1900:

"The Fourteenth Amendment and Special Assessments, by Harry Hubbard, of Dillon & Hubbard, New York."

Davidson *vs.* New Orleans, 96 U. S. 97, 106.
Spencer *vs.* Merchant, 125 U. S. 345, 356.
Walston *vs.* Nevin, 128 U. S. 578, 582.
Falbrook Irrigating Dist. *vs.* Bradley, 164 U. S 112, 170.

In concluding this branch of the case, therefore, we insist that there is no conflict between Norwood *vs.* Baker and Bauman *vs.* Ross, and that in this jurisdiction, and as to this case, the latter controls.

There was Due Process of Law in this Case.

As stated at the outset the second ground asserted by the Court of Appeals, for declaring the act of Congress in question unconstitutional, was that it failed to provide due process of law in that it failed to contain provision for notice to the owners of land to be assessed for benefits.

In considering this feature of the decision of the Court of Appeals, we shall, for convenience, subdivide the subject of notice in the following manner, and shall contend:

1. That the act of Congress itself provided sufficient notice of the proposed assessment.

2. That even if that is not so, it is not necessary that the act of Congress itself should provide for notice.

3. That even if the foregoing contentions are unsound the notice by publication given at the beginning of the proceedings was sufficient and personal service of process was not necessary.

4. That if personal notice of process was necessary, the personal service of process upon appellees actually given in this case was in ample season to constitute "due process of law."

The Act of Congress Itself Provides Sufficient Notice of the Proposed Assessment.

While the act makes no express provision for notice to the owners of land whose land is to be assessed, it nevertheless by necessary implication provides for such notice. An important consideration, to which we invite the attention of the court, is that this is not an act authorizing the opening of the streets, leaving the *time when the proceeding should be begun* to the discretion of the Commissioners; but the *act itself* fixed a time limit within which the proceeding should be instituted. The appellees are chargeable with notice of this act of Congress, and that the act itself required the institution of proceedings within thirty days. They are further chargeable with knowledge of the fact that the act expressly required the assessment of benefits against their property. They do not come in the category of the owners of "any adjacent pieces or parcels of land which will be benefited by the opening of said street," but in the category of the owners of "pieces and parcels of ground situate and lying on each side of the extension of said streets." It is identically the same, therefore, as if Congress had inserted in the act of Congress itself the names of the appellees and the name of the tract of land owned by them. Further, the operation of the act depended upon the voluntary act of the appellees themselves. The Commissioners had no right to file the petition until, after the passage of the act, the *appellees* made the dedication required by the second proviso to the first section of the act. The appellees themselves, therefore, by their own conduct, acting pursuant to the provisions of the act of Congress itself, made it operative. There is enough, therefore, in this case, considering that the constitutionality of the act of Congress is involved, to justify the court in holding that the act itself, by necessary implication, made provision for sufficient notice of its purpose to have benefits assessed against the land of the appellees.

It is Not Necessary that the Act of Congress Itself should Provide for Notice.

It was argued below, and will undoubtedly be argued here, that the act of Congress under consideration is void because in itself it failed to make provision for notice to the persons whose lands were to be assessed. We respectfully submit that this is not so.

At the outset it is important to bear in mind the distinction between the taking of land, which is the exercise of the right of eminent domain, and the assessment of benefits, which is the exercise of the right of taxation. The provisions of the act now assailed are those which relate to the exercise of the right of taxation. The difference is clearly recognized and pointed out in the opinion of the Supreme Court in the highway extension case, Bauman *vs.* Ross, 167 U. S. 558, where, in discussing the matter of benefits, the court said:

> "The provisions of this section are to be referred not to the right of eminent domain, but to the right of taxation, and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court."

The requirements of law with respect to notice are essentially different in the two classes of cases. The argument of the appellees is that the act of Congress itself should have made provisions for notice to the owners of land proposed to be assessed. A contrary view has been taken by this court and by the Court of Appeals of the District of Columbia.

In Paulsen *vs.* Portland, 149 U. S. 30, the city of Portland passed an ordinance providing for the construction of a sewer and the assessment of the cost thereof upon lots and blocks within a prescribed district. The validity of this assessment was challenged because of its alleged unconstitutionality, on the grounds that it determined arbitrarily and absolutely, that the property therein described was bene-

fited without giving the owners of property any notice or opportunity to be heard upon that question, and also on the ground that the ordinance itself provided for the construction of the sewer without providing for any notice to the owners of property to be assessed. It was contended that the act of the legislature providing for an assessment must also, to be valid, provide for some kind of notice to the property holder. Justice Brewer, delivering the opinion of the court said:

> "But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus in the case of Gilmore *vs.* Hentig, 33 Kan. 156, it was held that: 'Where a statute authorizes a city to provide for the construction of sewer and drains, and to tax the cost thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same." See, also, Cleveland *vs.* Tripp, 13 R. I. 50; Davis *vs.* Lynchburg, 84 Va. 861; Williams *vs.* Detroit, 2 Mich. 560; Gatch *vs.* DesMoines, 63 Iowa, 718; Balt. & Ohio RR. Co. *vs.* Pittsburg W. & K. RR. Co., 17 W. Va. 812, 835."

The Court of Appeals of the District of Columbia, 3 App. D. C. 24, where the same argument was made, said:

> "Many well-argued cases hold that this notice must be provided for in the act which confers the power, and that its omission, therefore, can not be compensated by the fact that the council, board or committee charged with the execution of the law may, of their own motion, provide for notice in the regulations or proceedings, which they may prescribe. Stuart *vs.* Palmer, 74 N. Y. 188; Kurtz *vs.* Sumption, 117 Ind. 1; Ullman *vs.* Mayor of Baltimore, 73 Md. 587."

The court then quotes the decision of the Supreme Court in Paulsen *vs.* Portland, *supra*, and adds:

> "In accordance with the doctrine of the foregoing case [Paulsen *vs.* Portland], it seems that when Congress shall confer the power upon the Commissioners of the District of Columbia to make improvements without the request or consent of the owners of abutting property, and assess a part of the cost against them, *the act itself need not expressly require notice*, provided full discretion is left to the Commissioners in the premises, and in accordance therewith they make public and permanent regulations which shall prescribe a fair, reasonable and uniform mode of giving notice to all parties whose property may be affected."

In Lyman *vs.* Plumer, 75 Iowa, 353, the court said:

> "There is no statute which requires a personal notice, nor is there a statute which requires *any* notice to be given.
>
> . . . . . .
>
> "When the power was conferred on the city to prescribe by an ordinance, the mode, or manner in which the charge for the improvement should be made, it embraced the right on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. *By necessary implication, the power was*

conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested in the general assembly, and if it was competent for the general assembly to provide that a notice by publication should be given, such power by necessary implication was conferred on the city."

It will be noted that this proceeding as a proceeding in court is distinct from a proceeding before a commission; that it is distinctly a proceeding *in rem* in the Supreme Court of the District of Columbia, holding a district court, to charge the land with the assessment, irrespective of its ownership, and not the owners thereof. The matter was committed to the court generally, full discretion being left in the court, to be proceeded with as deemed by the court proper under the circumstances, and after such notice as the court, by its order, might require. There was no limitation upon the court, nor was there any direct requirement as to the manner of proceeding. The power was granted in general terms, to be exercised by the court after such notice as it should prescribe. The act of Congress obviously intended to leave the whole matter to the court. The court, considering this to be the correct view of the law, directed the notices to be given, which are contained in the Record. It would seem that such notices, supplemented by the implied notice afforded by the act of Congress itself, were ample; they were very obviously effective in this particular proceeding.

Notice by Publication Was Sufficient.

It will be observed that the act committed, generally, the procedure for the taking of this land and the assessment of benefits resulting therefrom to the court, and the court itself prescribed the form of notice actually given. The provisions of chapter 11 relating to the taking of land required personal service of notice upon the owners of the land to be taken if found within the District of Columbia,

but there was no provision for service as to persons whose lands were to be assessed. Obviously there could not have been, even had Congress been disposed to provide for such notice, or the court to require it to be given. The act of Congress under consideration did not definitely fix the assessment area. The only limitations were the boundary lines of the District of Columbia. Such a provision is valid (Bauman *vs.* Ross, p. 591).

But it was impossible to know in advance of the finding of the jury whose lands would be benefited and assessed for benefits. For that reason personal service of notice could not have been made. The plan suggested by the Court of Appeals in its opinion was wholly impracticable.

The Court of Appeals suggested that after the jury had determined what lands should be benefited, it might be regarded as due process of law if a man received notice and was afforded an opportunity to be heard as to the extent of the benefit. According to the same reasoning, assuming both matters are committed to the jury as in this case, a man would seem to have as great a right to be heard upon the question whether his land is benefited at all, as to be heard upon the extent of such benefits. The Court of Appeals said that our Federal Constitution guarantees *personal service* of notice, and effort to make such personal service and failure therein can only afford the foundation for process by publication. We think that in so deciding, the Court of Appeals of the District of Columbia overlooked the distinction between the levying of a tax and the exercise of the power of eminent domain.

In this case, upon the filing of the petition, the Supreme Court of the District of Columbia ordered notice by publication for the appearance of "*all persons interested*," the order reciting that a petition had been filed, as required by the act of Congress, for the condemnation of the land necessary *and the assessment of benefits* "against the pieces or parcels of ground situate and lying on each side for the extension of

the street," which included the land of the appellees. This order was regularly published (Rec., pp. 2, 3). This notice, we submit, was sufficient.

In Lent *vs.* Tillsen, 140 U. S. 316, an act authorizing the widening of a street in San Francisco was assailed. The second section provided that the value of the land taken for the widening of the street, and the damages to improvements thereon and all expenses incident to such widening should be deemed to be the cost of widening the street and should be assesssed upon the district prescribed as benefited in a manner therein stated. The act provided for a notice by publication of not less than ten days in two daily papers printed in the city of San Francisco, notifying all persons interested to appear. Justice Harlan, delivering the opinion of the court, said:

> "Were not these provisions in substantial conformity with the requirements of 'due process of law' as recognized in the decisions of this court? In Davidson *vs.* New Orleans, 96 U. S. 97, 104, it was said that 'whenever by the laws of a State or by State authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be of a whole State or of some more limited portion of the communtity, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' So in Hagar *vs.* Reclamation District, 111 U. S. 701, 708, 'undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in

the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. . . . As stated by Mr. Justice Bradley in his concurring opinion in Davidson *vs.* New Orleans, 'in judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.' Of the different kinds of taxes which a State may impose, and of which from their nature no notice can be given, the court, in that case, enumerates poll taxes, licenses (not dependent upon the extent of business) and specific taxes on things, persons or occupations (Rec., p. 709, (572).

"These principles were reaffirmed in Kentucky Railroad Tax Cases, 115 U. S. 321, 331, and in Spencer *vs.* Merchant, 125 U. S. 345, 355, in the latter of which cases it was said that 'the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading or repairing (and, equally, the widening) of a street, to be assessed upon the owners of lands benefited thereby;' and that 'the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;' also, that 'if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.'

"Tested by these principles, the statute providing for the widening of Dupont street can not be held to be repugnant to the constitutional requirement of due process of law. The notice by publication to all who own property liable to be assessed for the cost of that improvement was appropriate to the nature of

> the case, and was reasonable in respect to the length of time prescribed for the publication. And ample opportunity was given to all persons interested to test in a court of competent jurisdiction the fairness and legality of any assessment proposed to be made upon their property for the purposes indicated by the statute. That court had power to require such alterations or modifications of the report of the board of commissioners as justice demanded. It was not bound to approve any report that did not conform to its judgment as to what was right; and without such confirmation the board could not proceed in the execution of the work contemplated by the legislature."

In Hagar *vs.* Reclamation District, 111 U. S. 702, an act of the legislature of California establishing a general system for reclaiming swamp and overflowed lands and the assessment of benefits resulting therefrom, was assailed as unconstitutional. The act required three commissioners to view and assess upon each acre to be reclaimed or benefited, a tax proportionate to the whole expense and to the benefits resulting from the work. The court said:

> "It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. . . .
>
> "The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provisions for such notice or hearing. . . .
>
> "In some States, instead of a board of revision or

equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or the amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law. In Davidson *vs.* New Orleans, this court decided this precise point. In that case, an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted, on the ground that the proceeding deprived the owners of their property without due process of law; but the court refused to interfere for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms 'due process of law,' and that it would be difficult to give a definition that would be at once perspicious and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: 'That whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'" 96 U. S. 97.

To the same effect are many cases in the States.

In State *vs.* Runyon, 41 N. J. Law, 103, the court said:

"In that case it was contended that the act of 1876 is inoperative and void for the reason that it

> makes no provision for notice to the owner of the mortgage of the assessment against him; affording him no opportunity to be heard upon the legality of the assessment to which he is subjected. . . . By section 10, the collector of the township is required to give notice of the time and place of such meeting by advertisements set up in at least four of the most public places in the township. . . . Until a comparatively recent period, such as is directed by the sections of the general tax law above referred to was the only notice given of the laying of taxes, and was always regarded as sufficient notification of the assessment and as affording adequate opportunity for objections by those on whom the tax was laid to make its imposition lawful."

In State *vs.* Jersey City, 28 N. J. Law, 503, the court held that notice by publication of a proposed assessment for public improvement was valid.

In the matter of the petition of De Peyster, 80 N. Y. 565, an effort was made to quash an assessment upon the premises of the petitioner for the expense of constructing a sewer, on the ground, among others, that no notice was given to the petitioner. It appeared that there was no personal notice of the proposed assessment or any effort to make such notice. The court said:

> "Personal notice is not needed. The legislature may prescribe what the manner of notice may be. Chapter 326 has provided for notice of the completion of the estimate and assessment to be given to owners or occupants of premises affected. This notice is by publication in daily newspapers for objections in writing to be presented within the time named. . . . The opinion in Stuart *vs.* Palmer, 74 N. Y. 183, is not in conflict. That demands merely that some notice be given and opportunity for hearing had before the assessment becomes conclusive. It says, 'the legislature may prescribe the kind of notice and the mode in which it shall be given.' We will not reason to the end that such notice is all that is

> exacted by the law of the land. Such has been the course of procedure in such cases too long to be now disturbed by legislative or judicial decision. The petition in this case does not present the question that such notice was not given. It presents the question of whether it is needful that there should be personal and individual notice as distinguished from the public and general notice given by advertisements in the newspapers. We think that is not needful."

In W. E. Railway Co. *vs.* Commissioners of Drainage, 134 Ill. 398, the court held that notice by publication was sufficient, the notice being addressed "to whom it may concern."

In the matter of the City of Amsterdam, 126 N. Y. 158, an effort was made to vacate an assessment of benefits for the extension of certain streets. It was objected that the charter of the city failed to provide any notice to the parties assessed, etc. A section of the charter required notice to be published of the determination of the city to make the improvement and to take the lands necessary therefor. After the appointment of the Commissioners a second notice was required to be given by publication, "of the time and place, when and where they will meet to make such ascertainment and assessment." The court said:

> "But after the commissioners have acted and have appraised damages upon the one hand and assessed for benefits on the other, they are required to file a report of their work with the city clerk. Then a third notice is to be given that the report of the commissioners has been so filed and that it may be examined by all interested; that it will be presented at a specified time to the Supreme Court for confirmation and that all persons desiring to object may file their objections with the city clerk. . . . This notice is not confined to the owners whose lands have been taken. It runs to all the parties interested and everybody so in fact interested has

been furnished ample opportunity by inspection of the report on file to know whether he is or not interested, and to file objections and assert his rights, if he shall so please. . . . The statute thus gives him his day in court and full opportunity to be heard."

The court here reviews and distinguishes Stuart *vs.* Palmer, 74 N. Y. 184, and then said:

"If such notice is awarded by the statute, it is of no consequence whether there is a hearing before the commission. Remsen v. Wheeler, 105 N. Y. 579, does not decide the contrary as the respondents contend, citing the last half of the sentence that 'unless the law gave them the right of notice and an opportunity to be heard before the board, which was authorized to impose the assessment, the act was invalid.' That was said of a case in which there was no provision for confirmation and the water-board which made the assessment, by its own action, effectually imposed the tax. Of course, there the necessary hearing was before the board, but the corresponding hearing here is before the special term, by whose action laying the tax is effectually imposed. No different doctrine was declared in Spencer *vs.* Merchant, 100 N. Y. 585; 125 U. S. 356, nor in People *vs.* Turner, 117 N. Y. 227. On the contrary, it was especially said in the latter case that 'notice by publication before the final confirmation of the assessment and an opportunity afforded to make objections within the time specified' constitute the constitutional requirement.

"It is objected here that not only is a notice required by the act to be given after the commissioners have made their assessment, but that the outlying owners would have no reason to suspect that their lands would be affected. The last suggestion is fairly answered by the facts in the Stuart Case. . . . In both cases the sufficient answer is that the landowners must be deemed to have known and understood the terms of the statute and, so, the district of assessment, and if their lands were within

> that district, they were bound to assume that they might be assessed. Here, that district was the city boundaries and everybody within it was notified of the assessment which might reach their lands, and their duty was to examine the report on file and see if it did. That the notice followed the action of the commissioners and did not proceed is no valid objection. That is always the case in the ordinary mode of taxation and the validity of a statute depends not on the mode or time of notice directed, but upon the fact that it directed it and furnished an effective opportunity to be heard."

In Meggitt *vs.* City of Eauclaire, 81 Wis. 326, the city authorities were authorized by charter to apportion the entire cost of a sewer and pavement on a street among the several lots fronting thereon, according to frontage, and the court held that in determining what property will be benefited by the improvement and hence should be assessed therefor, the action of the common council is conclusive. The court said:

> "The principal defect in the assessment here relied upon is the alleged want of notice. . . . The contention is that the charter requires no notice to be given to the lot owner, or any opportunity for the plaintiff to be heard as to the proper amounts of such assessments, respectively, with which her lots were charged. In other words, the contention is that by the provisions of the charter the city was authorized to take the plaintiff's property without due process of law, or any process of law, and hence that the same is in conflict with the Constitution, and therefore void."

The court reviewed the various authorities on the subject of notice and held, in effect, that notice by publication of the letting of the contract for the work, the filing of the statements of assessments and the proposed issue of bonds, unless the lot owners should elect to pay, constituted due process of law.

In Lyman *vs.* Plumer, 75 Iowa, 353, a suit was brought to restrain the collection of a special assessment for improving the streets, on the ground that notice by publication was insufficient. The ordinance provided that the city council, after the work was done and the assessment made to pay for the same, should pass a resolution containing a description of the property, etc., to be published in some daily newspaper, warning persons interested to show cause why the assessment should not be approved. No notice other than the publication of the resolution was given to or served upon the plaintiff. The question certified to the Supreme Court of Iowa was:

> "Is a notice published by resolution as provided by the ordinance sufficient notice to the *resident property owners*, and is it sufficient notice to give resident property owners an opportunity to be heard before the special assessment has been or was made, taking into consideration the fact that the city of Council Bluffs is organized under the general incorporation laws?"

The court said:

> "There is no statute which requires a personal notice, nor is there a statute which requires any notice to be given. That it is competent for the general assembly to prescribe the kind of notice, whether personal or by publication in a newspaper, can not we think, be doubted. . . . No case has been cited which holds that personal notice is required and we do not think that any well considered case so holds. . . . When the power was conferred on the city to prescribe by an ordinance, the mode or manner in which the charge for the improvement should be made, it embraced the right on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. By necessary implication, the power was conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested

> in the general assembly, and if it was competent for the general assembly to provide that a notice by publication should be given, such power, by necessary implication, was conferred on the city."

In Stewart *vs.* Board of Supervisors, 30 Iowa, 28, the court said:

> "Due process of law means ordinary judicial proceedings in court. . . . So that if this clause of the Constitution is held to apply to the taxing power, then no tax whatever for the support of the government can likely be levied and collected, except through the means of judicial proceedings in the courts; whereas it is well known that the sovereign power of taxation belongs exclusively to the legislative department of the government, and that all taxes are levied and collected in pursuance of legislative enactments, without the aid of the courts. This clause has no reference whatever to the taxing power, and where property is taken in the lawful exercise of the taxing power, it is not taken without due process of law."

In Ricketts *vs.* Village of Hyde Park, 85 Ill. 110, it was held that notice by publication of a special assessment for a public improvement, was sufficient.

In view of the foregoing authorities we submit the court below erred in holding that personal notice was essential to the validity of the assessment against the land of the appellees.

There was Due Process of Law in this Case.

It will be noted that in addition to the notice by publication, given at the institution of the proceedings, after the jury had made its award and had determined the amount of the assessment against the land of appellees, the appellees were served with personal notice to show cause, if any, why the assessment should not be confirmed. The Court of Appeals held that this notice was too late to be

effective, and did not constitute "due process of law" within the meaning of the Fifth Amendment to the Constitution. In this we submit the court erred. We submit that notice given before the assessment became a charge or lien against the appellees' property, with opportunity to contest its validity, was all that "due process of law" requires.

In considering this feature of the case, it will be noticed that the amount of proposed assessment, as ascertained by the jury, did not become a charge or lien upon the property of the appellants until confirmed by the court. It was the act of the court confirming the assessment which made it a tax and a charge upon property; and before that was done in this case full opportunity was afforded the appellees, *after personal service of notice upon them*, to appear before the court and question the assessment, with a full right of appeal. This constituted "due process of law" within the meaning of the Fifth Amendment, as respects the exercise of the power of taxation.

In Cooley on Taxation, page 266, the author says:

> "It is not customary to provide that a taxpayer shall be heard before the assessment is made, but a hearing is given afterwards either before the assessors themselves or before some court or board of review. And of the meeting of that court or board the taxpayer must in some manner be informed; either by personal notice or by some general notice which is reasonably certain to reach him, or, which is equivalent, by some general law which fixes the time and place and of which he must take notice. The last is a common method of enabling him to be heard."

In Hagar *vs.* Reclamation District, 111 U. S. 701, this court says it is—

> "due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its conclusion."

In Yoeman *vs.* Riddle, 84 Iowa, 161, which was a proceeding to vacate a special assessment for repairing a county ditch, it was contended that the assessment was void for want of notice. There was no notice given of the making of the assessment but the laws made provisions for an appeal. The court said:

> "The assessment and levy of taxes in accord with law by proceedings wherein are provisions for an appeal or other means of correcting any error, illegality or want of authority, is not in conflict with the provision of the Constitution against the deprivation of property without due process of law."

In Cleveland *vs.* Tripp, 13 R. I. 51, an effort was made to vacate an assessment for the construction of a sewer on the ground, among others, that the statute did not direct any notice to be given of the assessment, and afforded no right of appeal. The court said:

> "Is is enough, the courts hold, that the person assessed has an opportunity to contest the validity of the assessment in some judicial proceeding after it has been made."

In Gilmore *vs.* Hentig, 33 Kan. 156, a suit was brought to enjoin the collection of a tax levied by the city of Topeka for certain public improvements, on the ground, among others, that there was no notice. The court said:

> "But the statutes alone can not usually furnish a sufficient notice to property owners with regard to special taxes levied upon their property; for special taxes are levied at very irregular periods for various purposes and in various modes. Hence it is generally necessary to give property owners some specific notice with regard to special taxes. It is not necessary, however, in any case, that the notice should be personally served upon the property owner, or that the proceeding should be a judicial proceeding, but any notice that will enable the property owner to procure a hearing before some officer, board or

> tribunal, and to contest the validity and fairness of the tax assessed against him before the same shall become a fixed and established charge upon his property, will be sufficient. Nor is it necessary, in any case, that a notice should be given before the taxes are levied. All that is necessary is, that the notice shall be given before the taxes shall have become such a fixed and permanent charge that the property owner can have no adequate remedy to contest their validity or fairness. . . . In the present case, the statutes did not require that any notice shall be given. . . . We think that the statute is valid, and still that a notice is required. . . . As before stated, we think that the statute is valid, but nevertheless that notice of some kind must be given, but as the statute says nothing about a notice, the city evidently has a broad and almost unlimited discretion with reference to the kind of notice that may be given, and the manner in which it may be given."

In the matter of Amsterdam, 126 N. Y. 158, it appeared that the commissioners of assessment were required by the charter to file a report of their work with the city clerk, and then a notice was to be published that such report was on file for the inspection of all persons interested, and that it would be presented in a specified time to the Supreme Court for confirmation, and that all persons desiring to object might file their objections with the city clerk. On the day appointed, the court was to hear the parties on the report and might confirm or annul it. It was held that these proceedings constituted due process of law, and afforded sufficient notice to those whose property did not abut on the street as well as to the owners of abutting property.

The foregoing well considered case is very similar to the case at bar.

In Davidson *vs.* New Orleans, 96 U. S. 97, this court said:

> "Whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden

> is imposed upon property for the public use . . . and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'

In concluding this branch of the case we submit, in view of the foregoing authorities, that the law itself provided, and the appellees in fact were accorded, "due process of law."

The Act is Not Unreasonable.

There were several other arguments in opposition to the assessment against the land of the appellees, advanced at the argument below, but not mentioned in the opinion of the court, which may be renewed here. One was that the act is void because it is unreasonable, and its unreasonableness seems to consist in requiring an assessment against the land of the appellees after they had dedicated portions of the land for the extension of the street. But that is an argument which should have been addressed to Congress or considered by the appellees before they voluntarily put the act in operation by making the dedication imposed as a condition precedent to the opening of the street, when they were apprised by the act itself that the assessment was to be made against land "situate and lying on each side of the extension of said streets," in which category came the land of the appellees.

The appellees gave certain land in order to force a street through the adjacent land of another. They were not required to give it; but they did, and now the law is characterized as unreasonable because they are not given in return a benefit to the residue of their holding without an assessment. It was not an exchange at the outset, but complaint

is now made because it is not so treated. It must be conceded that the residue of the holding of appellees is benefited. The argument is one that should have been addressed to Congress.

The Assessment Complained of Clearly Identifies and Describes the Land of the Appellees.

The objection of the appellees made below that the assessment is defective is untenable. The verdict of the jury does not, as claimed by them, omit in the description of the property assessed the proper designation of the courses. An inspection of the original verdict, the order *nisi*, and the publication of the latter in the papers designated by the court, shows that the courses in each case are properly indicated in degrees and minutes. Nor is there any defect in the description of the first piece assessed, as claimed. That description is altogether complete and sufficient.

But it is respectfully submitted that appellees are not at liberty to make such objections on this appeal. They filed no sufficient exception upon the subject. An exception, as in this case, that the description of the property "is inaccurate, insufficient and defective," is entirely too general in its terms and points to no particulars; it is the equivalent of a general assignment of errors and nothing more. No such question as that presented in appellees' brief below on the insufficiency of description was mentioned or argued by counsel at the hearing before the Supreme Court of the District of Columbia, and it can not be entertained on appeal for the first time.

Appellees were not Entitled as a Matter of Right to a Second Jury.

It was argued below that the appellees were entitled as a matter of right to a second jury.

The only provision of law for a second jury as a matter of right is contained in chapter XI, Revised Statutes of the

District of Columbia. This chapter, however, relates exclusively to the *condemnation* of land for a road or highway. Section 263 of the chapter provides for a second jury "if the proper authorities or any owners of the land are dissatisfied with the verdict." It is manifest that the "owners of the land" refers to owners of the land condemned for the highway. The only verdict with which that section deals is a verdict of condemnation and not a verdict of apportionment of benefits.

The exceptional right to demand a second jury must be plainly conferred by express provision of law. The act of Congress approved March 3, 1899, directing the present proceeding, made no such provision. In the nature of the case, such a provision would practically prevent the extension of highways under the scheme of the present law; it would be impossible to reach a final verdict if there was such a provision. Each succeeding verdict might assess property not included in the preceding verdict, and each such assessee *toties quoties* could, upon mere demand, have the verdict set aside. No such absurd result can be imputed to Congress in dealing with this important subject matter.

We respectfully submit that the exceptions to the verdict, award, and assessment of the jury are not well taken, and that the judgment of the court below should be reversed and the judgment of the Supreme Court of the District of Columbia affirmed.

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No. 283.
Brf. of Leighton for Appellees.
Filed Oct. 12, 1900.

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JAMES H. McKENNEY,

In the Supreme Court of the United States.

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No. 283.

JOHN B. WIGHT ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

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BRIEF FOR APPELLEES.

B. F. LEIGHTON,
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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

By act of Congress approved March 3, 1899, it was enacted, among other things, that within thirty days from the passage of the act, the Commissioners of the District of Columbia were directed to institute in the Supreme Court of the District of Columbia a proceeding to condemn the necessary land to open and extend S, Twenty-second, and Decatur streets, through lots forty-one (41) and forty-two (42) of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, being part of "Widow's Mite"; provided—

> "That the owners of the 'Kall' tract dedicate the land in said tract contained within the lines of said streets; *and provided further*, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, *not less than one-half thereof* shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said

> streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

Section 5 of said act provided that the proceedings for condemnation of said land should be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia. By section 7 of said act it was provided:

> "That the sums to be assessed against each lot and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder theoeof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken."

The eighth section of said act provides that on the confirmation of said assessments by the court, they shall constitute a lien upon the land assessed, and be collected as special improvement taxes in the District of Columbia are collected. Said section contains a proviso—

> "That no appeal by any interested party from any decision of the Supreme Court of the District of Columbia confirming said assessment or assessments, shall delay or prevent the payment of said awards in respect to the property condemned."

Under the provisions of this act the Commissioners of the District of Columbia, on or about March 31, 1899, filed a petition in the Supreme Court of the District of Columbia,

sitting as a District Court of the United States for said District, seeking to condemn the land necessary to extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, in accordance with the provisions of chapter 11 of the Revised Statutes of the United States relating to said District.

Said petition averred that the owners of the Kall tract had dedicated to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second, and Decatur streets. A copy of a map showing the proposed extension of said streets was appended as an exhibit to said petition, and is found in the record, after the petition in this case. Said petition also sets out the provisions of said act of Congress relating to the assessment of one-half the damages awarded against the parcels or lots of ground lying on each side of the extension of said streets and the adjacent property benefited by the opening thereof, and concludes with a prayer for process, and such further orders and proceedings in the premises as were contemplated by the act of Congress authorizing the condemnation.

On the 3d day of April, 1899, the court below passed an order reciting the substance of said petition and its purport, and directing that all persons interested in said proceedings should appear in said court on or before the day of said month, and show cause, if any they had, why the prayer of said petition should not be taken; provided a copy of said order be published in the Washington Post and the Washington Times newspapers at least six times, and in The Washington Law Reporter once, before said 22d day of April, 1899. Due proof of the publication of said order, as directed by the terms thereof, appears to have been made. Thereafter the court passed an order directing the marshal to summon a jury as prayed in said petition, and directing them to assess not less than one-half of the amount found

due and awarded as damages, against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which should be benefited by the opening thereof.

Thereafter, on August 30th of said year, the jury returned their verdict in the case. In their verdict, among other things, the jury stated that W. Riley Deeble, Esq., represented the Kall tract; that he also was examined as a witness on behalf of the petitioners. Mr. Leroy Tuttle, whose land was sought to be condemned by these proceedings, was personally served with process. Appellants were not served with process. They had no notice of the proceedings other than that implied from the order of publication passed in said cause, as hereinbefore set out. The statement in the verdict of the jury that appellants were represented by W. Riley Deeble, Esq., is an inadvertence, as will appear by the affidavit of the said Deeble filed in said cause, and also the affidavit of John C. Davidson, Esq. (Rec., pp. 16, 17).

The jury awarded damages to Mr. Leroy Tuttle for the land sought to be taken by these proceedings, in the sum of $52,000; one-half of this sum, or $26,000, they assessed against the land of Mr. Tuttle adjacent to the streets to be opened, and other land in the vicinity, which they assume to have been benefited by the opening of said streets; of the sum of $26,000, $14,000 was assessed against the Kall tract, belonging to appellants. On September 19, 1889, the court passed an order *nisi* confirming said verdict, award and assessment of benefits, unless cause to the contrary were shown on or before the 4th day of the following month. It was further ordered that the marshal serve a copy of the order *nisi* on the owners of the land condemned, and the owners of the land assessed in said verdict. In pursuance of this order, appellants were served with a copy of said order *nisi*.

On the 4th day of October, 1899, appellants filed exceptions to the confirmation of the award, and finding of the jury in this cause, as the owners of a tract of land known and described in said proceedings as the Kall tract.

These exceptions are in the following language, to wit:

> "Now come the respondents, Charles H. Davidson and Albert A. Wilson and John B. Larner, trustees, and except and object to the confirmation of the award and finding of the jury in respect to that tract or parcel of land situate in the county of Washington, District of Columbia, known as the Kall tract, and as more particularly described in the petition and proceedings in this cause, to which reference is hereby made, and to the assessment of damages made by said jury in respect to each and every part and parcel of said tract, because they say:
>
> "First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings were had and taken, and by a proper construction thereof no damages can be assessed against said tract of land or any part thereof, or these respondents as owners of said land.
>
> "Second. Because said act is unconstitutional and void, in that it contains no provision for notifying the owners of property to be assessed in advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such assessment might be made effective, and for other vices and defects apparent upon the face of the statute.
>
> "Third. Because the statute under which said assessment is made is a statute relating to the condemnation of land solely, and contains no provision touching the assessment of benefits, and was not intended to provide for such assessment.
>
> "Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land

therefor and the assessment of benefits is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement as to the assessment of benefits against property forming no part of that sort to be condemned.

"Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient and defective.

"Sixth. Because said award of damages and finding of the jury in that behalf is excessive, unjust, and unreasonable.

"These respondents, therefore, each and severally request and demand said award and finding to be set aside, and that a new jury be impanelled in accordance with the provision of the statute in such case made and provided."

Thereafter, on the 9th of October, 1899, the petitioners in said cause moved for a final confirmation of the verdict, award and assessments, notwithstanding the objections thereto. On the 18th day of November following, the court passed a decree overruling said exceptions, and confirming in all respects the verdict of award and assessments so made by said jury, as aforesaid. From this order of confirmation appellants appealed to the Court of Appeals of the District of Columbia.

Upon hearing, the Court of Appeals reversed the court below, and held—

First. That the act under which the condemnation proceedings were had and taken was unconstitutional and void.

Second. That the notice given in this case to the appellees was not such as the law required, and was insufficient to bring the appellees properly before the court, and that the assessment was void on that account.

The case was brought by appeal to this court.

I.

The act upon which the proceedings in this case are based is unconstitutional, because it arbitrarily fixes the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed, by the opening of said streets.

The only theory of law, upon which the cost of land taken by the government for public highways, can be assessed, in whole or in part upon land lying in the vicinity of the streets to be opened, instead of being paid out of the public treasury, is the fact that the land assessed is specially benefited to the amount of the assessment. A statute which arbitrarily assumes that certain land in the vicinity of public improvements will be benefited in a gross sum, and does not afford the assessed owner at some time during the progress of the assessment, and before its enforcement, an opportunity to be heard upon the question of fact, as to whether or not the benefit conferred upon the property is equal to the burden imposed, is unconstitutional.

In the now famous case of Norwood *vs.* Baker, Mr. Justice Harlan, speaking for the majority of the court, said:

> "The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement."

And, continuing, said:

> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, *to the extent of such excess*, a taking under the guise of taxation, of private property for public use without compensation."
>
> 172 U. S. 278, 279.

This case, also, by necessary implication, establishes the principle that the power to determine whether a particular piece of property will be benefited or not, by a proposed public improvement, and to what extent, is a judicial, and not a legislative function. The village of Norwood proceeded in accordance with, and not in violation of, the provisions of the statute law of the State of Ohio.

The first section of the act of Congress under consideration, provides that of the amount found to be due, and awarded as damages for the land to be condemned, under the provisions contained in the act for the opening of said streets, not less than one-half should be assessed by the jury in said proceedings, against the parcels of land lying on each side of the extension of said streets, and also on all or any adjacent parcels of land which would be benefited by the opening thereof, as provided by the terms of said act. The statute does not declare in terms, that the land situate in the vicinity of the streets to be extended, will, as a general rule, be specially benefited, and then leave the question of what property is specially benefited, and the extent of such benefit, to be ascertained by the jury; but it arbitrarily directs the jury to assess at least 50 per cent. of the amount awarded for damages for the land taken, to be assessed against the property lying on each side of the street to be extended, and any other adjacent land which they may find has been specially benefited. By the very terms of the act, the question as to whether or not the land to be assessed will be specially benefited, and the extent of such benefit, is withdrawn from the consideration of the jury. The amount of the award of damages for the land to be condemned, could only be known after the finding of the jury. How could Congress tell in advance of such finding, that the land in the vicinity of the streets to be extended, would certainly be benefited to the extent of at least one-half of such award? As was held by the court below:

"It is true that in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made only on property benefited by the improvement, and provides that the assessment shall be made in a judicial proceeding. But it does not leave the question of special benefits to be determined in such proceeding. It arbitrarily finds for itself that the whole adjacent property subject to assessment, or intended to be assessed, will have been specially benefited to the extent at least of one-half of the cost of the improvement; and all that is left to the jury in the judicial proceeding, is, not to find the value of the special benefit to each adjacent piece of property, but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots. This we think, is in direct contravention to the principle enunciated in the case of Norwood *vs.* Baker, and can not be supported as a valid exercise of legislative authority."

Since the decision in Norwood *vs.* Baker, other courts, upon similar statutes to the one now before the court, have reached the same conclusion as did the Court of Appeals of the District of Columbia, in the case at bar. In the case of Charles *vs.* The City of Marion et al., the court had under consideration, a statute providing that the entire cost of paving a street, should be assessed against the abutting property, by the front foot. The assessment in this case seems to have been made after a survey by the surveyor, reporting the cost of improvements, the average cost of running front foot, the name of the property owners, the number of front feet owned by each, and an opportunity on the part of such owners to appear and contest the correctness of the engineer's report. The decisions of the courts of the State of Indiana, where the case originated, seem to have uniformly upheld the validity of such legislation, and such method of assessment. The court, in disposing of the case, said:

"The method of assessment prescribed by the statute is in conflict with the doctrine of Village of Norwood *vs.* Baker. It is clear that the statute under which the present proceedings are prosecuted provides that the entire cost of the street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage measurement, without any regard to the special benefits received by it. It provides for no notice and hearing to ascertain and determine the actual benefits specially received by the land owner by reason of such improvement. The only notice and hearing provided for is one to revise and correct the report and estimate of the engineer, so as to make it conformable to the basis of assessment prescribed in sections 3, 5 and 6. Such legislation is unconstitutional and void, under both the Federal and State Constitutions, because it constitutes a taking of property without just compensation, and is a denial of the equal protection of the law. Statutes substantially like the one under consideration, since the decision in Norwood *vs.* Baker, *supra*, have been held invalid by many courts, although prior to that decision the same or similar statutes had been upheld by the same courts upon the same theory upon which the legislation of this State has been upheld."

100 Fed Rep. 542.

The case of Fay et al. *vs.* City of Springfield et al., decided May 19, 1899, had under consideration a similar statute, and reached a similar result, the court closing its opinion in the following language:

"Equality is equity. And the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefitted, does not depend alone upon the State constitution exacting equal taxation, but has 'its foundation in those elementary principles of equity and justice which lie at the root of the social compact' (In re Canal Street, 11 Wend. 154–156), and he can therefore invoke for its security and protection the Federal Constitution,

> which inhibits not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the State the power to 'deny within its jurisdiction the equal protection of the laws.' Following what I conceive to be the ruling of the Supreme Court in the case of Norwood *vs.* Baker, the temporary injunction asked for is granted."
>
> 94 Fed. Rep. 421.

The city council of the city of Houston, State of Texas, adopted a resolution declaring the improvement of a certain public street or highway, running in front of the plaintiff's property, to be a public necessity, and directed, in pursuance of the powers vested in them by the city charter, that the cost of the improvement, together with the cost of collection, should be assessed against the plaintiff's property, abutting on said highway, except at the point where said highway was intersected by cross streets. The Court of Appeals of the State of Texas upheld the validity of the assessment. The case was brought by writ of error to the Supreme Court of Texas, and the decision of the lower court was there reversed. Justice Brown, speaking for the court, said:

> "The court of civil appeals followed strictly the case of Adams *vs.* Fisher, 75 Tex. 657: 6 S. W. 772, in which Judge Stayton said: 'The charter of the city of Galveston gives to its council the legislative power to determine whether such an improvement will be for the public interest, and also to determine whether it will be of such benefit to property fronting on that particular street to be improved as will justify the imposition of a part of the costs of the improvement on the owners of such property, and its determination of this question must be deemed conclusive,' and in support of the opinion, Judge Stayton quoted from city of Ludlow *vs.* Trustees of Cincinnati Southern Railway Co., 78 Ky. 360, as follows: 'While assessments of this character, as distinguished from general taxation, rest upon the basis

of benefits or presumed benefits to the property assessed, it is not essential to their validity that an actual enhancement in value or other benefit to the owner be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property.' In that opinion, the court followed the great weight of authority by which this extraordinary power has been sustained with remarkable unanimity. But in the case of Village of Norwood *vs.* Baker, 172 U. S. 269; 19 Sup. Ct. 187, recently decided by the Supreme Court of the United States, the rule announced in Adams *vs.* Fisher has been completely overturned, and all precedents establishing it have been set aside. We recognize the binding force of the decision of the Supreme Court of the United States upon this question, but we the more readily apply it because we indorse it as a timely and just announcement of the superiority of a constitutional guaranty of a rule of law established by the courts."

Hutcheson et al. *vs.* Storrie, 51 S. W. Rep. 849.

To like effect are the cases of—

Loeb *vs.* Trustees, 91 Fed. Rep. 37.

Lyon *vs.* Town of Tonawanda, 98 Fed. Rep. 361.

The case of Spencer *vs.* Merchant, cited in appellant's brief, did not decide the point now under discussion. Mr. Justice Harlan, in discussing that case, in the case of Norwood *vs.* Baker, said:

"The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

172 U. S. 296.

That Congress possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia, as was declared in Parsons *vs.* District of Columbia, is not sought to be controverted. It may, in its discretion, take away any and all political privileges from the inhabitants of said District; it has a large, but not absolute discretion as to the form of government by which the people of the District shall be governed; but it may not lawfully deprive the people residing therein of the constitutional guarantees respecting life, liberty and property. It can not take from a private citizen thereof, his property, without due process of law. Allen *vs.* Wilson, 105 U. S. 547. Neither do the appellees controvert the proposition that the assessment must be referred to the power of taxation, and was not in the exercise of the right of eminent domain; but the power of taxation, even by the Congress of the United States, is a limited, and not an absolute power, especially when such power is exercised for the purpose of fixing special burdens upon particular individuals.

The case of Bauman *vs.* Ross is not in point, and has no application to the part of the statute under consideration, relating to the assessment of benefits. The statute before the court in that case, did not in terms, or by necessary implication, direct any particular land to be assessed. The jury were to assess land which they found to be benefited by the opening of the highways, and none other; and this court held that the taxing district, as prescribed by that statute, was co-terminus with the boundaries of the District of Columbia. Said Mr. Justice Gray, speaking for the court on this point:

> "The lands to be assessed being described generally as 'the lands benefited' by the condemnation and establishment of the new highway, or by the abandonment of an existing highway, and again as the 'property thereby benefited,' and as the lands which the jury 'find to be so benefited,' without any

> words of restriction to lands in the particular subdivision, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment."
>
> 167 U. S. 591.

The construction put by appellants in their brief, upon the provisions of the act relating to the assessment of benefits, is not tenable. The lands lying on each side of the streets to be extended were to be assessed, and all or any adjacent parcels of land found to be benefited by the opening of said streets.

Webster defines the word "adjacent" as follows:— "Lying near, close or contiguous, but not actually touching;" so that the taxing area in this case was limited to the lands abutting on the streets to be opened, and that lying in the immediate vicinity.

Nor has the case of Parsons *vs.* District of Columbia, 170 U. S, 45, 52, 56, any application to the statute to be construed in this case. Quoting again from the opinion in Norwood *vs.* Baker, *supra*:

> "The power conferred upon the Commissioners [in that case] was, not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such power can not be reviewed by the courts" (p. 294).

Without discussing or attempting to reconcile all of the cases cited by appellants in their brief, with the case of Norwood *vs.* Baker, appellees respectfully submit that the principles laid down in that case are conclusive against the validity of the statute under discussion.

II.

Said act is void because it contains no provision for notifying the owners of the property to be assessed, in advance of such assessment, or at any time pending the consideration of the cause by the jury. The proceedings under which the assessment was made do not constitute due process of law.

To constitute due process of law, the statute authorizing the assessment must contain in itself provision for notice to the parties whose property is to be assessed, either in express terms or by necessary implication; and the notice must be of such a character as to afford the parties whose interests are affected opportunity to be heard before the assessment becomes final. The hearing must be before a tribunal capable of making corrections and rectifying errors; otherwise the notice itself is vain and nugatory, and as much a violation of constitutional right as though no notice of any character were provided by law. The leading case on the subject of notice in cases of this character is that of Stuart *vs.* Palmer, 74 N. Y. 183. This was an action brought by the plaintiff against the defendant, as collector of taxes, to vacate an assessment upon plaintiff's land, as a cloud upon his title, and to restrain him from collecting the same. The act under which the alleged assessment was made contained no provision for notifying the owners when assessments were to be made. Justice Earle, speaking for the court, said:

> "I am of the opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. *It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing; the law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly*

apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it can not dispense with all notice.

. . . . . .

"It must be conceded that property can not be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both Federal and State Constitutions guarantee to every citizen. Can it be, that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard?

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property, without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature can not do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but

> extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature."

The principles enunciated in this case were expressly referred to and reaffirmed in the matter of McPherson, 104 N. Y. 321, and also in the case of Remsen *vs.* Wheeler, 105 N. Y. 579. The opinion in both these cases was delivered by Justice Earle, and in so far as the principles laid down by the court in the case of Spencer *vs.* Merchant, in 100 N. Y. 586, are inconsistent with those announced in Stuart *vs.* Palmer, they must be considered as overruled by that court. It is to be observed that Justices Earle and Repallo dissented from the opinion rendered in this case, and the case itself is never afterwards cited, so far as I can discover, in the decisions of that court. This case was carried to the Supreme Court of the United States, on a writ of error, and the judgment of the court below was affirmed by a divided court, Justice Gray delivering the opinion of a majority of the court. Justices Matthews and Harlan dissented, and Justice Matthews filed a dissenting opinion, in which he said:

> "It is impossible for me, therefore, to reconcile the opinion of the Court of Appeals of New York, now under review, and the opinion of the same court in Stuart *vs.* Palmer. The same objection applies to both statutes with equal force. As I think the Court of Appeals was right in its judgment upon the first statute, I am of the opinion that its judgment upon the act of 1881, involved in this writ of error, should be reversed."

In the case of San Mateo *vs.* Southern Pacific RR. Co., 13 Fed. Rep. 722, one of the questions before the court was as to whether an assessment was valid which was made under a law which did not provide for notice to the owner in a case where the Constitution was silent on that subject. Justice Field, in the course of his opinion said:

"There being then no provision of law giving to the company notice of the action of the state board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment, be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company, requiring for any just estimate of their value, accurate knowledge upon a multitude of subjects, not usually possessed without special study. We can not assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty or his property without an opportunity of being heard against the proceeding. It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. *Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form.* Notice to him (the owner) will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding—whether judicial or administrative, summary or protracted, and whether it takes property directly or

> creates a charge or liability which may be the basis of taking it—the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority, absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

In this connection, the court quotes extensively from Stuart *vs.* Palmer, *supra*, and gives to the principles therein announced, its express approbation.

In the case of Brown *vs.* City of Denver, the court had under consideration the validity of an ordinance of the city of Denver, known as the "Sidewalk Ordinance." It required lot owners to construct sidewalks at their own expense, in front of their lots. The publication of the ordinance, itself, was, by the terms of the ordinance, to constitute notice to the owners, and was the only provision respecting notice found in the ordinance. The validity of the ordinance was attacked, on the ground that it was in violation of section 1, article 14, of the Amendments to the Constitution of the United States, as well as in violation of the State Constitution. The court held the ordinance to be in violation of both the Federal and State Constitutions. On the subject of notice, it said:

> "But when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, as a matter of favor, in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment can not be made under an invalid law or ordinance, and its constitutionality is to be tested not by what has been done under it, but by what it authorizes to be done by virtue of its provisions."

7 Colorado, 312.

In this case the court cited the case of Stuart *vs.* Palmer, *supra*, and numerous other cases, in support of its contention.

In the case of The Mayor, etc., of Baltimore *vs.* Scharf, one of the questions before the court was as to the validity of an ordinance passed by the city of Baltimore, providing for the repairing and recurbing of certain streets, and assessing the cost of the work to be done against the owners of the property binding on the streets to be improved. The ordinance did not make any provision for a hearing of the property owners. The court held the ordinance, on that account, to be invalid, and cited with approval the case of Stuart *vs.* Palmer, *supra*. In the course of its opinion, the court said:

> "The injustice of such legislation is glaring. It is not only unjust; it is an invasion of those rights which can not be interfered with except 'by due process of law;' and this 'due process of law' involves a day for, and an opportunity for, a hearing. This ordinance makes no provision for notice, and on the authority of adjudged cases, is invalid."
>
> 54 Md. 519.

This case was subsequently reargued, and the judgment of the court was reversed, Justices Alvey and Irving dissenting. It was reversed on the authority of The Mayor, etc., of Baltimore *vs.* Johns Hopkins Hospital, reported at page 1, 56 Md.

In the latter case Justice Alvey delivered a dissenting opinion, in the course of which he said:

> "And in regard to notice, we know of no system of taxation in which the parties affected by the assessments are not allowed, at some stage of the proceeding, an opportunity to be heard. Indeed, upon fundamental principles of right and justice, and as a guaranty of the rights of the citizen against arbitrary exactions, notice is deemed, by the courts of the

> highest authority, an essential element in the legality of all assessments, whether of ordinary taxes or for special benefits; and any mode of assessment by which it has been attempted to deny to the parties affected, the right and opportunity to be heard in their defense, has been denounced as essentially vicious, and therefore inoperative and void. Without notice, therefore, no valid assessment can be made."

In the case of Ullman *vs.* Mayor, etc., of Baltimore, reported in 72 Md. 587, the same question was before the court. The court returned to the doctrine laid down in its first opinion in Scharf's Case, and receded from and overruled the other Maryland cases in conflict with the principles therein laid down, thus placing the decision of that court in line with the views of the dissenting justice expressed in his dissenting opinion in Mayor, etc., of Baltimore *vs.* Johns Hopkins Hospital. *supra.*

So, in the well argued case of Allman *vs.* District of Columbia Justice Shepard, speaking for the court said:

> "Whilst there is a difference of opinion with respect to the stage of the proceeding at which the notice must be given, the mode and form of giving it, and the purpose thereof, there is general concurrence in the view that *reasonable notice at some serviceable stage of the proceedings is absolutely necessary to the validity of the assessment.*"
>
> 3 App. D. C. 20–1–2–3–5.

The following cases are of similar purport:

Davidson *vs.* New Orleans, 96 U. S. 97.

Santa Clara Co. *vs.* S. Pacific RR. Co., 18 Fed. Rep. 385.

Cupp *vs.* Seneca Co., 19 Ohio St. 173.

Chi. & Alton RR. *vs.* Smith, 78 Ill. 98.

Powers *vs.* Bears, 12 Wis. 245.

Mulligan *vs.* Smith, 59 Cal. 219.

Owners of Ground *vs.* Albany, 15 Wend. 375.
In re Village of Middletown, 82 N. Y. 196.
Bauman *vs.* Ross, 167 U. S. and cases cited.

All of the cases upon the subject of notice, reviewed by the court in this last case, contained an express provision for notice to the owners of the property to be assessed, and opportunity to be heard before the assessment became final.

Statutes derive their vitality and effectiveness from the legislature, and not from the courts; that is not statutory law which derives its effective energy from any other source than the legislative will.

Rice *vs.* Foster, 4 Harrington, 479.
Johnson *vs.* Rich, 9 Barb. 680.
Thorne *vs.* Cramer, 15 Barb. 112.
Barto *vs.* Himrod, 8 N. Y. 483.
Parker *vs.* Con., 6 Penna. 507.

The act of March 3, under discussion, is silent on the subject of notice. The procedure for the condemnation of land for the streets directed to be extended was to be regulated by the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia. This latter statute did not contemplate, and makes no provision for, the assessments of benefits. It relates to the condemnation of land solely. The damage awarded for the taking of the land, was to be paid out of the common treasury, and no part of it was to be assessed either on the adjoining lands belonging to those whose land was to be condemned, or upon other land in the vicinity which might be benefited by the opening of the streets. The only notice provided for by the statute was a personal notice. There was no suggestion of a notice by advertisement. The act respecting the assessment of benefits, is exactly similar to the statute before the court in the case of Stuart *vs.* Palmer, *supra.*

Appellants in this cause were not parties to the petition; they were not served with process prior to the assessment; the only notice that can in any way be assumed to have affected them or their rights, is that contained in the order of the court of April 3, 1899, warning all persons interested in the proceedings to appear in court, on the day named, to show cause why the prayer of said petition should not be granted. This order was based upon no statutory authority, and is, for that reason, simply void.

For a like reason, the order of the court of September 19, 1899, directing personal service of the verdict of the jury assessing the appellants' land, to be served upon them, is void and nugatory. Had the statute expressly provided for service of personal notice, at this stage of the proceedings, and under the conditions existing in this case, it would have failed to have imparted validity to this assessment. *It was too late to be effective.*

Allman *vs.* District of Columbia, *supra.*

The jury had done its work, and been dismissed. No memorial had been made of the evidence taken before them, if any such there was. The court was without power to correct error, if error there were, in the finding of the jury. It could confirm or reject the verdict of the jury, and there its power stopped. Hearing, in the legal sense of the term, there could not have been before such a tribunal. The term imports power to correct error; to prevent injustice. *No hearing* is the precise equivalent of a hearing before a tribunal without the power to determine.

The appellants argue that the act expressly required the assessment of benefits against the land of the appellees abutting on the part of the street donated by them; and that they must be classed with the list of owners, described in the statute "of pieces and parcels of ground situate and lying on each side of the extension of said streets." Such a

construction is not warranted by the language of the act. It provided for the opening and extension of S, Twenty-second and Decatur streets, through lots 41 and 42 of a tract of ground described as Phelps and Tuttle's subdivision. The assessment was to be made on land lying on each side of the streets *extended*. That is, through the land lying on each side of said streets, in said lots 41 and 42, as described in said act. The streets were not to be *extended* through the Kall tract, within the meeting of the act. The act was to be operative only upon the dedication by the owners of the Kall tract, of the land lying within the limits of the streets to be extended; and while the appellees may have had knowledge of the existence of said statute, and of its provisions, such knowledge has never hitherto been regarded as the legal equivalent of notice. There are only two modes known to the law by which notice can be given; one is by personal service upon the individual to be affected, and the other is by advertisement; and where the law requires notice at all, these are the only two ways by which it can be given. Where notice is required by law, and the mode of service is not specified, the law requires that it shall be personal.

> Chicago & Alton RR. Co. *vs.* Smith, *supra.*
> Pennoyer *vs.* Neff, 95 U. S. 719.

There is no pretence that there was any personal service in this case, until after the jury were discharged, and no reason is disclosed in the record, why such personal service may not have been made prior to the assessment, as well as afterwards. As was well said by Mr. Justice Morris, on this point, in delivering the opinion of the court below:

> "There is nothing in the suggestion that the proceedings were directed by the statute to be had in the Supreme Court of the District, sitting as a District Court of the United States, and that such process would thereupon be sufficient as was appropriate

in a District Court, which would warrant the substitution of a notice of publication in the place of personal service of process. The District Courts of the United States do not proceed by notice of publication instead of personal service of process, any more than do other courts, except where they act as courts of admiralty; and even then, though their proceedings are substantially *in rem*, rather than *in personam*, they can scarcely, in view of the circumstances, be regarded as exceptional. If they were, they would afford no warrant for the present proceeding, for the District Court has much other jurisdiction than that of admiralty, in which notice of publication is not to be thought of for a moment as a legal substitute for personal service of process. Notice of publication in modern practice is a purely statutory device to enable the courts of justice to reach property within their jurisdiction when the parties in interest are beyond their jurisdiction, and can not be reached by personal process, the ordinary common law and inalienable right of all persons under ordinary circumstances.'

It is respectfully submitted, that in any view that can be taken of the point under discussion, there was no such notice in the case, as constitutes due process of law.

III.

By proper construction of the statute authorizing the condemnation proceedings, the jury were not warranted in assessing benefits against the Kall tract.

The statute under which these proceedings were taken required appellants to dedicate so much of their land, known as the Kall tract, as was embraced within the limits of the streets to be extended. In compliance with this requirement, appellants contributed 77,925 square feet of ground, contiguous to and adjoining that condemned, on the west, for street purposes. The land belonging to Mr. Leroy Tuttle, lying within the limits of Decatur and S streets, aggregated 33,428 square feet, less than one-half the area of

that given by appellants, under the requirements of the statute, for street purposes. The jury found the value of the land taken from Mr. Tuttle to be $52,000, and they awarded him that sum in bulk; which is at the rate, on the average, of a little over $1.54 per square foot. Fifty per cent. of this sum, or $26,000, they assessed upon the property supposed to be benefited by the opening and extension of said streets. Against Mr. Tuttle's property they assessed as benefits the sum of $10,000, which, deducted from the amount awarded, leaves the net sum of $42,000, money actually paid to Mr. Tuttle as the result of these condemnation proceedings. Of the residue of said benefits, they assessed the sum of $14,000 against the Kall tract. The land donated by appellants was worth at least two-thirds as much per square foot as the contiguous land belonging to Mr. Tuttle; so that the net result of the condemnation proceeding, as worked out by the jury and the court, seems to be that the appellants, in order to have the street opened, were obliged to donate to the public, lands of the value of at least $80,000, and to help pay for the lands condemned, an additional sum of $14,000, thus making a total of $94,000 contributed by them under this statute for the purpose of securing the opening of these public thoroughfares; while Mr. Tuttle, whose land joins upon theirs, is paid the sum of $42,000 for land which is less than one-half the area, and but little more than half the value of that dedicated by the appellants. The interpretation of a statute that worked such a practical result can hardly commend itself to the conscience or judgment of the court.

Statutes should receive such a construction as will, if possible, avoid an unjust or absurd conclusion.

Law Ow Ben *vs.* United States, 144 U. S. 47.

Church of the Holy Trinity *vs.* United States, 143 U. S. 457.

Henderson *vs.* Mayor of New York, 92 U. S. 259.

United States *vs.* Kirby, 7 Wall. 482.

Otis *vs.* National Bank, 100 U. S. 239.

It is the duty of the court to discourage any construction that will lead to absurd results.

United States *vs.* Kirby, *supra.*

A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.

Jackson *vs.* Collins, 3 Cowen, 95.

IV.

The Kall tract comprises several acres of ground, of irregular outline, only part of which is assessed with benefits. The parts so assessed are inaccurately and insufficiently described, and the assessment is void for that reason.

The assessment, in order to be valid, must clearly mark out and identify the property, so that the court can determine, upon inspection, the outlines of the property embraced in the assessment.

In the case of Green *vs.* Lunt, 58 Me. 533, the court thus states the doctrine:

> "If there is no definite parcel taxed, there can be no lien, and if no lien, there can be no legal sale; hence the inference is irresistible that, in the assessment which establishes the lien, and which is the foundation on which rests all the subsequent proceedings, the lots taxed must be definitely and distinctly described" (p. 533).

The case of Rokendorff *vs.* Taylor's Lessee was a case that went to the Supreme Court from the Circuit Court of the District of Columbia. One of the points in the case touched the sufficiency of a notice of sale by the collector of taxes of the property in controversy, which described the property as "one-half of Lot 4, in Square 491;" the other half was advertised at the same time, under the same description, as belonging to other parties. The court held that the notice was radically defective.

4 Pet. 362.

One of the points in the case of Bensinger *vs.* District of Columbia was as to the sufficiency of the description of a lot assessed for taxes. The lot was assessed in the name of its owner. The number of the square was given, and the lot was described as "of Lot 2." There were other elements of description added from which the court might have figured out the location of the lot and its area; but it held that the description of the lot was inadequate for want of certainty of description.

6 Mackey, 287.

This case was followed in McClellan *vs.* District of Columbia, 18 D. C. 94.

See, also, in this connection—

Secs. 242 and 243, 1st Blackwell on Tax Titles, and cases cited.

The rule of construction applied in the interpretation of a deed conveying land, between private parties, or relating to the construction of a contract for the purchase or sale of land between private persons, does not apply to assessments; a description which would be adequate in the one case would not be sufficient in the other.

In the case of assessments it is always a question of fact, and not of intent, and a defective description can not be helped out by parol evidence, showing what was the purpose of those charged with the execution of the law. The case of Orton *vs.* Newman is illustrative of this distinction. In this case the plaintiff relied upon a tax deed in which the property was described as "part of the N. W. ¼, Lot 3;" then followed other terms of description. The court held that the words "being known as" or "described as" could not be supplied between the letters and numerals "N. W. ¼" and "Lot 3," and that the deed was for that reason void for uncertainty.

23 Wis. 102.

De Lorme *vs.* Ferk, 24 Wis. 201.

The assessment in this case covers only a portion of the tract of land owned by appellants. The verdict of the jury attempts to set out, by metes and bounds, courses and distances, the several pieces assessed; but it omits in each of the pieces of property assessed, the proper designation of the courses. In every case it uses numerals to designate the courses, but whether degrees, minutes or seconds are meant, is not indicated; the numerals and punctuations are placed in such a way, as to make it impossible to determine whether degrees, minutes and seconds are meant, or degrees, and fractions thereof, or minutes and fractions thereof are intended; and the verdict contains no reference by which this omission and indefiniteness can be corrected.

The description of the first piece sought to be assessed is further defective, in that it does not show at what angle the third line in said description leaves the second line of the outlines of said tract; nor is the course of said line given; nor does the description state whether said line intersects the westernmost boundary line of said Kall tract, or whether it stops short of it; and while obviously, only a part of the tract is assessed, what part, is left in doubt and uncertainty (Rec., p. 8).

V.

The award of damages and finding of the jury is, as to the Kall tract, excessive, unjust and unreasonable, and ought to be set aside for that reason.

Considering the various assessments of benefits, in connection with the pieces of property upon which they are made, and the relative position of other property in the vicinity, it is clear that gross inequalities are found in the verdict in respect to the apportionment of benefits. Lots two (2) to five (5), both inclusive, in Block thirteen (13), Kalorama Heights subdivision, are each assessed $100; the remaining lots to the west, fronting on the same street,

which, while perhaps all are not equally benefited, are certainly benefited by the opening of said street, eastward, are not assessed at all; so with Lots twenty-five (25), twenty-six (26) and twenty-seven (27), in Block twelve (12) of said subdivision, they are assessed $100 each, while those to the west, adjoining, are not assessed at all. The inequality of the verdict is more apparent when the assessment placed upon the second piece of the Kall tract is considered, and that piece is compared with the contiguous property fronting on Decatur place. This tract of ground is assessed $5,000 in benefits; while Lots one (1) to eleven (11), both inclusive, in Block twelve (12), Kalorama Heights, which are certainly benefited by the opening of Decatur place and Twenty-second street, are not made to bear any part of the burden incidental to the opening of these streets. All of these last-named lots, as well as Lots from twenty-one (21) to forty-four (44) in said subdivision, abutted upon a blind street, until the extension of Decatur street; each and all of these lots were certainly benefited to a very appreciable degree by the dedication and opening of the streets in these proceedings described. The same is true of Lot twelve (12) in Block ten (10) of said subdivision; it is not conceivable that this is not benefited at all, while the lot adjacent to it on the north (the last piece of the Kall tract described in the verdict of the jury) is assessed for $2,000. It is submitted that the finding of the jury in this regard is unjust and unreasonable, and that the verdict ought, on this account, to be set aside.

It is respectfully submitted, that upon any proper view to be taken of this case, the judgment of the court below is correct, and ought to be affirmed.

B. F. LEIGHTON,
Attorney for Appellees.

Supreme Court of the United States.

No. 283.—October Term, 1900.

John B. Wight and others, Commissioners of the District of Columbia, Appellants, vs. Charles H. Davidson, A. A. Wilson and John B. Larner, Trustees.	Appeal from the Court of Appeals of the District of Columbia.

[April 29, 1901.]

Congress, by an act approved March 3, 1899, entitled "An act to extend S street in the District of Columbia, and for other purposes," enacted as follows:

"Section 1. That within thirty days from the passage of this act the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary to open and extend S, Twenty-second and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: *Provided*, That the owners of the 'Kall' tract dedicate the land in said tract contained within the lines of said street: *And provided further*, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

* * * * * *

"Sec. 5. That the proceedings for the condemnation of said land shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of land in said District for public highways."

"Sec. 7. That the sums to be assessed against each lot or piece or parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of said streets."

On March 31, 1899, the Commissioners filed a petition in the Supreme Court of the District, alleging that the owners of the Kall tract had dedicated to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second and Decatur

streets; that a map of the proposed extension of said streets, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, had been prepared and a copy thereof annexed to the petition; and praying the court to direct the marshal of the District to summon a jury to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which said streets were proposed to be extended, might sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by the said act of Congress and by chapter 11 of the Revised Statutes of the United States, relating to the District of Columbia, to the end that a permanent right of way for the public over said lands might be obtained and secured for the extension of said streets.

On April 3, 1899, an order of publication was made by the court directing that all persons interested in the proceedings to appear in the court on or before the 22d day of April, 1899, and show cause, if any they have, why the prayer of said petition should not be granted, and that a copy of the order should be published in the Washington Post and the Washington Times newspapers at least six times and in the Washington Law Reporter once before the said 22d day of April, 1899.

On July 21, 1899, it was ordered by the court that, whereas notice by advertisement had been duly published, a jury should be summoned to be and appear upon the premises to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend said streets, as prayed in said petition, and directing that of the amount due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less than one-half thereof should be assessed by said jury against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which would be benefited by the opening of said streets; and to further proceed in accordance with the act of Congress approved March 3, 1899.

On August 30, 1899, there was filed in the Supreme Court of the District a return or report by the marshal, setting forth the appointment and qualification of the jurors, and a statement of the proceedings of said jury in taking testimony and hearing arguments of counsel. With the report of the marshal there was also filed a verdict in writing by the jury in the following terms:

"In the Supreme Court of the District of Columbia, holding a District Court for said District.

"*In re* extension of S, Twenty-second and Decatur streets.—No. 549.

"We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary to open and extend S, Twenty-second and Decatur

streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on the plat or map filed with the petition in this cause, as set forth in schedule 1, hereto annexed as part hereof; and we, the jury aforesaid, in accordance with the act of Congress, approved March 3, 1899, for the extension of said streets, do hereby assess the sum of $26,000, being not less than one-half of the damages so, as aforesaid, awarded in schedule 1 against the pieces and parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which we find will be benefited by the extension of said streets, as set forth in schedule 2, hereto annexed as part hereof."

By schedule 1, annexed to the award, it appears that the jury awarded to the owners of parts of lots 41 and 42 of Phelps and Tuttle's subdivision of Widow's Mite, as damages for land within the lines of S and Twenty-second streets extended, the sum of $36,000, and to the owners of part of lot 41, included in the lines of Decatur Place extended, the sum of $16,000.

By schedule 2 it is shown that the jury apportioned one-half of said damages among the owners of pieces or parcels of land benefited, and that among those found to be benefited were the owners of the Kall tract, and against whose lands there were assessed various sums amounting, in the aggregate, to $14,000.

On September 19, 1899, the Supreme Court of the District entered an order confirming the award and assessment, unless cause to the contrary should be shown on or before the 4th day of October, 1899, and directing that a copy of said order should be published once in the Washington Law Reporter and twice in the Evening Star before that date; and further ordering that the marshal should serve a copy of the order personally on all the owners of land condemned and all the owners of land assessed in said verdict, with one-half of the damages awarded therein, who might be found within the District of Columbia, and if not found therein, then by mailing a copy thereof to the place of abode or last known place of residence of each owner or owners.

On September 29, 1899, the marshal returned that he had served a copy of the order personally on, among others, the appellees, and had mailed copies to such parties as resided without the District.

On October 4, 1899, the appellees filed exceptions to the confirmation of the award and finding of the jury, as to the owners of the tract of land known in the proceedings as the Kall tract. The exceptions were as follows:

"First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings are had and taken, and by a proper construction thereof no damage can be assessed against said tract of land, or any part thereof, or these respondents as owners of said land.

"Second. Because said act is unconstitutional and void, in that it contains no provision for notifying the owners of property to be assessed in

advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such assessment might be made effective, and for other vices and defects apparent on the face of the statute.

"Third. Because the statute under which said assessment is made is a statute relating to a condemnation of land solely, and contains no provision touching the assessment of benefits, and was not intended to provide for such assessment.

"Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land therefor, and the assessment of benefits, is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement as to the assessment of benefits against property forming no part of that sought to be condemned.

"Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient and defective.

"Sixth. Because said award of damages and finding of the jury in that behalf are excessive, unjust and unreasonable.

"These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be empannelled in accordance with the provisions of the statute in such case made and provided."

On November 18, 1899, after argument, the exceptions were overruled, and the verdict, award and assessment were in all respects confirmed. Thereupon the cause was taken on appeal to the Court of Appeals of the District of Columbia. On April 25, 1900, the order and decree of the Supreme Court of the District were reversed by the said Court of Appeals, and the cause was remanded to the Supreme Court of the District, with directions to vacate such order or decree and for said other proceedings therein, if any, as might be proper and not inconsistent with the opinion of the Court of Appeals. (— App. Cas. ——.) An appeal was thereupon allowed to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia reversing an order or decree of the Supreme Court of the District confirming an assessment upon lands of the appellees for alleged benefits accruing from the opening of certain streets adjoining such lands, and presents for determination the constitutionality of an act of Congress, approved March 3, 1899, under which the assessment complained of was made.

It may well be doubted whether the appellees are in a position to question the validity of the statute. They are the owners of the "Kall" tract mentioned in the first section of the act, and with respect to which it was made a condition that the owners should dedicate the land in said tract

contained within the lines of the streets to be extended; and, it appears by the record, that, in order to procure the desired action of the Commissioners, they did dedicate to the District of Columbia for highway purposes the land in said tract contained within the lines of S, Twenty-second and Decatur streets.

Prior to the filing of the petition of the Commissioners, the authorities of the District had taken no steps towards the contemplated extension of these streets. In fact, under the act they had no power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

"Under some circumstances, a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect." (Cooley on Taxation, 573; *Tark* v. *Adams*, 10 Cush. 252; *Bidwell* v. *City of Pittsburgh*, 85 Pa. St. 472; *Lafayette* v. *Fowler*, 34 Ind. 140; *Shutte* v. *Thompson*, 15 Wall. 151, 159.)

However, as we learn from this record that there are others than the appellees concerned in the question of the validity of the act of Congress, and as the decision of the Court of Appeals, by declaring the act void as to the appellees, operates to defeat or suspend proceedings under it, and under other existing acts of Congress in similar terms, respecting public improvements in the District, we prefer to pass by the question whether the appellees are estopped by having made the dedication imposed as a condition precedent to the opening of the streets, and to place our decision upon the question discussed by the Court of Appeals and which controlled its decision, namely, that of the constitutionality of the act of Congress under which the proceedings were had.

The principal objections urged against the validity of the act are, first, because, as is alleged, it arbitrarily fixes the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed, by the opening of the streets; and, second, because it contains no provision for notifying the owners of the property to be assessed, in advance of such assessment, or at any time pending the consideration of the cause by the jury.

In *Bauman* v. *Ross*, (167 U. S. 548,) on appeal from the Court of Appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation, and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court—citing *Willard* v. *Presbury*, (14 Wall. 676;) *Mattingly* v. *District of Columbia*, (97 U. S. 687;) *Shoemaker* v. *United States*, (147 U. S. 282, 302.) It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the

commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners—citing the cases hereinbefore mentioned.

By the act of June 17, 1890, (26 Stat. 159,) Congress enacted that the Commissioners of the District of Columbia shall have the power to lay water mains and water pipes and erect fire plugs and hydrants, whenever the same shall be, in their judgment, necessary for the public safety, comfort or health. By the act of August 11, 1894, (28 Stat. 275,) it was provided "that hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per linear front foot against all lots or lands abutting upon the street, road or alley in which a water main shall be laid."

On October 5, 1895, Homer B. Parsons filed in the Supreme Court of the District of Columbia a petition against the District of Columbia and the Commissioners thereof, complaining as illegal of a certain charge or special assessment against land of the petitioner, as a water main tax or assessment for laying a water main in the street on which said land abuts. After a hearing upon the petition and return, the petition was dismissed. An appeal was taken to the Court of Appeals of the District of Columbia, where the judgment of the Supreme Court of the District was affirmed. The cause was then brought to this court, and by it the judgment of the Court of Appeals was affirmed. (*Parsons* v. *District of Columbia*, 170 U. S. 45.) The principal grounds of complaint were that the lot owner was given no opportunity to be heard upon the question of cost, or utility, or benefit of the work, or of the apportionment of the tax; that the assessment was made without any estimate of the cost of the work to be done, and without regard to the cost of the work or the value of the improvement, and not upon the basis or benefits to the property assessed.

This court held that the legislation in question was that of the United States, and must be considered in the light of the conclusions, so often announced, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia—citing *Mattingly* v. *District of Columbia*, (97 U. S. 687;) *Gibbons* v. *District of Columbia*, (116 U. S. 404;) *Shoemaker* v. *United States*, (147 U. S. 282;) *Bauman* v. *Ross*, (167 U. S. 548;) that when, by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the

necessity of the work, and of the benefits as against abutting property; that to open such questions for review by the courts, on the petition of any and every property holder, would create endless confusion; that where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard; that the function of the Commissioners, under the act, was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and pipes, and of erecting fire plugs and hydrants, and that their *bona fide* exercise of such a power cannot be reviewed by the courts.

If, then, the reasoning and conclusions of these cases are to be respected as establishing the law of the present case, it is plain that it was within the power of Congress, by the act of March 3, 1899, to order the opening and extension of the streets in question, and to direct the Commissioners of the District to institute and conduct proceedings in the Supreme Court of the District to condemn the necessary land; and it was also competent for Congress, in said act, to provide that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one-half thereof should be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as provided for in the said act, and that the sums to be assessed against each lot or piece or parcel of ground should be determined and designated by the jury, and that, in determining what amount should be assessed against any particular piece or parcel of ground, the jury should take into consideration the situation of said lots and the benefits that they mig[illegible] severally receive from the opening of said streets.

It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the Supreme Court of the District gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of Congress would subsequently be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsel. The return of the marshal shows that some, at least, of the

property owners appeared before the jury, produced witnesses, and were heard by counsel. If the appellees did not avail themselves of these opportunities, the court and jury, proceeding according to law, were not to blame.

The record shows that, on September 19, 1899, the court passed an order *nisi* confirming the verdict, award and assessment of benefits, unless cause to the contrary should be shown on or before the 4th day of the following month, and directing service of a copy of the order *nisi* on the owners of the land condemned and on the owners of the land assessed in said verdict. It also appears that the appellees were served with this copy, and that they accordingly filed exceptions to the finding of the jury and to the confirmation of the award, on October 4, 1899.

On the 18th of November, 1899, after hearing, the Supreme Court of the District passed a decree overruling the exceptions, and confirming the verdict of award and assessments made by the jury.

Upon the authorities heretofore cited it would therefore appear that the act of Congress of March 3, 1899, was a valid enactment, and that the proceedings thereunder were regular and constituted due process of law, unless reasons for a different conclusion can be found in the opinion of the Court of Appeals, which reversed the decree of the Supreme Court of the District, and ordered the dismissal of the petition.

What, then, was the reasoning upon which the Court of Appeals proceeded? It was thus stated in the opinion:

"The principal questions raised by the assignments of error are two, 1, that of the constitutionality of the act of Congress under which the proceedings have been had; and, 2, that of the sufficiency of the notice given to the appellants in respect of the assessments upon their property.

"1. With respect to the first of these questions, we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States, in the case of *Norwood* v. *Baker*, (172 U. S. 269.)

"As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high-tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of the special benefit which has accrued to him from the public improvement adjacent to his property."

But we think that the Court of Appeals has not correctly appraised the decision in *Norwood* v. *Baker*, and that, on examination, that decision and the reasoning on which it is founded will not be found to be applicable to the case now before us.

That case came to this court on an appeal from the Circuit Court of the United States for the Southern District of Ohio, wherein it had been held that for a municipality of a State to condemn land for a street through the property of a single owner, and then assess back upon his abutting property the entire damages awarded, together with the costs and expenses

of the condemnation proceedings, is to take private property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. (*Baker* v. *Norwood*, 74 Fed. Rep. 997.) In the opinion of this court it was said:

"The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the bill of rights of the constitution of Ohio."

It will, therefore, be perceived that there the court below and this court were dealing with a question arising under the Fourteenth Amendment of the Constitution of the United States, which, in terms, operates only to control action of the States, and does not purport to extend to authority exercised by the Government of the United States.

In the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling State legislation.

However, we need not pursue this suggestion, because we think the Court of Appeals, in regarding the decision in *Norwood* v. *Baker* as overruling our previous decisions in respect to Congressional legislation in respect to public local improvements in the District of Columbia, misconceived the meaning and effect of that decision. There the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard

on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation, and accordingly affirmed the decree of the Circuit Court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found, upon due and proper inquiry, to be equal to the special benefits accruing to the property.

That it was not intended by this decision to overrule *Bauman* v. *Ross* and *Parsons* v. *The District of Columbia* is seen in the opinion, where both those cases are cited, and declared not to be inconsistent with the conclusion reached. (*Norwood* v. *Baker*, 172 U. S. 269, 294.) Special facts, showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity; and this was thought by a majority of this court to have been the case in *Norwood* v. *Baker*. But no such facts are disclosed in this record.

The second proposition upon which the Circuit Court proceeded was that sufficient notice had not been given in respect of the assessments upon the property. This question, we think, has been disposed of by previous decisions, and has been sufficiently discussed in a previous part of this opinion.

The decree of the Court of Appeals of the District of Columbia is reversed and the cause remanded to that court with directions to affirm the decree of the Supreme Court of the District of Columbia.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 283.—October Term, 1900.

John B. Wight and others, Commissioners of the District of Columbia, Appellants, *vs.* Charles H. Davidson, A. A. Wilson and John B. Larner, Trustees. } Appeal from the Court of Appeals of the District of Columbia.

[April 29th 1901.]

Mr. Justice Harlan (with whom concurred Mr. Justice White and Mr. Justice McKenna) dissenting.

I am of opinion that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

Under the act of March 3d 1899 it was competent for the jury, *without regard to special benefits*, to put upon the lands abutting upon each side of the streets authorized to be opened and extended *not less* than one-half of the entire damages found due and awarded in respect of the property taken under the first section of that act. It could only consider the question of benefits in respect to "adjacent" pieces or parcels of land. For the reasons stated in my dissenting opinion in *French* v. *Barber Asphalt Paving Company*, I cannot agree that such a statutory regulation or rule is consistent with the Constitution of the United States. My views upon the general subjects of special assessments are expressed in that opinion and need not be repeated here.

The court in the present case says that Congress has exclusive jurisdiction, municipal and political, in the District of Columbia, and is not controlled by the Fourteenth Amendment, although it is controlled by the Fifth Amendment providing, among other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. "But," the court proceeds, "it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment and maintaining the validity of acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling legislation." These observations were made to sustain the proposition that the principles announced in *Norwood* v. *Baker*, 172 *U. S.* 269, in reference to the validity of State enactments relating to local public

improvements, have no necessary application to a case of a like kind arising under a similar act of Congress relating to local public improvements in the District of Columbia. As the court does not pursue this subject, nor express any final view upon the question referred to, I refer to this part of its opinion only for the purpose of recording my dissent from the intimation that what a State might not do in respect of the deprivation of property without due process of law, Congress under the Constitution of the United States could, perhaps, do in respect of property in this District. The Fifth Amendment declares that no person shall be deprived of property "without due process of law." The Fourteenth Amendment declares that no State shall deprive any person of property "without due process of law." It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the Fourteenth Amendment but not applicable under the Fifth Amendment, or upon principles applicable under the Fifth and not applicable under the Fourteenth Amendment. It seems to me that the words "due process of law" means the same in both Amendments. The intimation to the contrary in the opinion of the court is, I take leave to say, without any foundation upon which to rest, and is most mischievous in its tendency.

The court withdraws this case from the rule established in *Norwood* v. *Baker* upon the ground that the legislature of Ohio "had not defined or designated the abutting property as benefited by the improvement." But this is a mistake; for, as plainly stated in the opinion in that case, the State, by statute, had authorized villages to establish streets and highways and to meet the cost of such improvements by special assessments on the abutting property, according to *frontage, without regard to special benefits accruing to the property so assessed.* And, to repeat what I have said in *French* v. *Barber Asphalt Paving Company*, just decided, it was because and only because of this *rule*, prescribed *by the legislature*, that the State enactment was condemned as unconstitutional. The enactment, under which the council of Norwood proceeded, put upon the abutting property, when the municipality proceeded under the front-foot rule, the *entire* cost of opening a street; precluding, by a *rule* established for such cases, the owner of the property from showing that the cost was in excess of special benefits and was confiscatory to the extent of such excess. *Norwood* v. *Baker* expressly rejected the theory that the entire cost of a public highway, in which the whole community was interested, could be put, under legislative sanction, on the abutting property, where such cost was in substantial excess of the special benefits accruing to the property assessed.

The court, in this case, says that "special facts showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity." What this

means, when taken in connection with what has been said and intimated by the court in *French* v. *Barber Asphalt Paving Co.*—especially when considered in the light of the broad declarations in other cited cases as to legislative power—I confess I am unable to say. What "special facts," in the case of special assessments to meet the cost of a public improvement, would show an abuse of the law? What is meant by the words "an actual deprivation of property?" If private property abutting on a street be assessed for the cost of improving the street in excess of special benefits accruing to such property, is the assessment to the *extent of the excess* such an abuse of the law or such an actual deprivation of property as would justify the interference of a court of equity? In *Norwood* v. *Baker* this question was answered in the affirmative. Whether that doctrine is to remain the court does not distinctly say either in the present case or in any of the cases relating to special assessments just determined.

I submit that if the present case is to be distinguished from *Norwood* v. *Baker*, it should be done upon grounds that do not involve a misapprehension of the scope and effect of the decision in that case. If Congress can, by direct enactment, put a special assessment upon private property to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended.

True copy.

Test:

Clerk Supreme Court, U. S.